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In The Supreme Court of the United States

SCOT HOLLONBECK, et al.,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act of 1973 forbids "discrimination [on the basis of disability] under any program or activity receiving Federal financial assistance." Where a recipient establishes a number of subsidiary programs, does section 504 forbid discrimination in the recipient's covered actions as a whole, or only discrimination within each such subsidiary recipient program considered separately?

PARTIES

The petitioners are Scot Hollonbeck, Jose Antonio Iniguez and Jacob Walter Jung Ho Heilveil.

Respondent United States Olympic Committee is a federally chartered corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Regulation Involved	2
Statement of the Case	4
Reasons for Granting the Writ	15
I. The Tenth Circuit Has Decided An Important Question Of Federal Civil Rights Law That Should Be Settled By This Court	15
II. The Court Of Appeals Has Decided An Important Question of Federal Law In A Manner That Conflicts With Decisions Of This Court	24
III. The Decision Of The Tenth Circuit Is In Conflict With The Decision Of Several Courts Of Appeals	28
Conclusion	34

APPENDIX

Opinion of the Court of Appeals for the Tenth Circuit, January 16, 2008	1a
Memorandum Opinion of the District Court for the District of Colorado, November 16, 2006	21a

TABLE OF CONTENTS – Continued

Page

Order of the Court of Appeals for the Tenth Circuit Denying Rehearing and Rehearing En Banc, February 25, 2008 ..... 72a

Federal Statutes Prohibiting Discrimination "Under" A "Program or Activity" Receiving Federal Financial Assistance 74a

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985).....24, 25, 29

Babbitt v. Sweet Home Chapter of Community for a Greater Oregon, 515 U.S. 687 (1995).....28

Barnes v. Gorman, 536 U.S. 181 (2002).....22

Cannon v. University of Chicago, 441 U.S. 677 (1979).....22

Gratz v. Bollinger, 539 U.S. 244 (2003).....24

Grove City College v. Bell, 465 U.S. 555 (1984).....26

Gutierrez v. Ada, 528 U.S. 250 (2000).....28

Klinger v. Department of Corrections, 107 F.3d 609 (8th Cir. 1997).....30, 31, 32

NCAA v. Smith, 525 U.S. 459 (1999).....22

Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).....25

Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004)....28, 29, 30

Safeco Ins. Co. of America v. Burr, 127 S. Ct. 2201 (2007).....28

School Board of Nassau County v. Arline, 480 U.S. 273 (1987).....22

United States Dept. of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986).....22

Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffler, 537 U.S. 371 (2003).....28

TABLE OF AUTHORITIES – Continued

Page

STATUTES

20 U.S.C. § 1681 22
20 U.S.C. § 1687 31
28 U.S.C. § 1254(1) 1
29 U.S.C. § 794(a) 27
29 U.S.C. § 794(b) 13, 26, 31
36 U.S.C. § 220503(4) 2
36 U.S.C. § 220505(c) 3
42 U.S.C. § 6101 26
42 U.S.C. § 2000d 21
42 U.S.C. § 2000d-4a(2)(A) 23
Amateur Sports Act 5
Civil Rights Act of 1964, Title VI 21-23, 26
Civil Rights Restoration Act of 1987 ..... 2, 31
Education Act Amendments of 1972, Title IX 21-22, 26, 31-33
Rehabilitation Act of 1973, Section 504 ..... *passim*

RULES AND REGULATIONS

28 C.F.R. § 41.51(b) 3
28 C.F.R. § 41.51(b)(3) 24
Rule 12(b)(6), Federal Rules of Civil Procedure 11

TABLE OF AUTHORITIES – Continued

Page

Rule 35(a), Federal Rules of Appellate Procedure 14

Rule 35.1(A), Tenth Circuit Rules 15

OTHER AUTHORITIES

S.Rep. No. 105-325 5

Petitioners Scot Hollonbeck, Jose Antonio Iniguez and Jacob Walter Jung Ho Heilveil respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on January 16, 2008.

OPINIONS BELOW

The January 16, 2008 opinion of the court of appeals is reported at 513 F.3d 1191 (10th Cir. 2008), and is set out at pp. 1a-20a of the Appendix. The February 25, 2008 order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 72a-73a. The November 16, 2006 memorandum opinion of the district court, which is reported at 464 F. Supp. 2d 1072 (D. Colo. 2006), is set out at pp. 21a-71a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on January 16, 2008. A timely petition for rehearing was denied on February 25, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

29 U.S.C. § 794(a), originally enacted as section 504 of the Rehabilitation Act of 1973, provides in pertinent part:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(b), originally enacted as part of the Civil Rights Restoration Act of 1987, provides in pertinent part:

> "Program or activity" defined
>
> For the purposes of this section, the term "program or activity" means all of the operations of –
>
> * * *
>
> (3)(A) an entire corporation, . . .
>
> (i) if assistance is extended to such corporation . . . as a whole

36 U.S.C. § 220503(4), which established the purposes of the federally chartered United States Olympic Committee ("USOC"), states that one of those purposes is

> to obtain for the United States, directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each event of the

> Olympic Games, the Paralympic Games, and Pan-American Games.

36 U.S.C. § 220505(c), which establishes the authority of the United States Olympic Committee, states in pertinent part:

> The corporation may – organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games, the Paralympic Games, and the Pan-American Games. . . .

28 C.F.R. § 41.51(b), a provision of the Department of Justice coordinating regulation governing section 504, provides in pertinent part:

> (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> > (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
> >
> > (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others:
> >
> > * * *
>
> (3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

> (i) That have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap. . . .

STATEMENT OF THE CASE

The United States Olympic Committee ("USOC") is a federally chartered corporation charged by Congress with responsibility for overseeing and supporting participation by American athletes in the Olympics, the Pan-American Games, and the Paralympics. Because the USOC has received federal financial assistance, it is subject to the requirements of section 504 of the Rehabilitation Act of 1973, which forbids disability-based "discrimination under any program or activity receiving [such assistance]." The district court concluded that the USOC "relegates Paralympians to second class status in the quantity and quality of benefits and support they receive from the USOC." (App. 47a).

A divided panel of the Tenth Circuit nonetheless upheld as entirely lawful the USOC's treatment of the disabled athletes who comprise the United States Paralympic team. (App. 5a-15a). Judge Holloway dissented, objecting that "[w]hat the statute forbids is exactly what has occurred and is occurring here." (App. 15a). Six members of the Tenth Circuit concluded that the case was sufficiently important to warrant rehearing en banc, but en banc rehearing was rejected on a 6-6 tie vote. (App. 72a-73a).

The Paralympic, Olympic and Pan-American Games

In 1950, Congress chartered what is now the USOC to organize and promote United States' participation in international Olympic competition. In 1978, Congress enacted the Amateur Sports Act, which gave the USOC broad responsibility for coordinating amateur athletics, and expanded its mandate to include coordinating and supporting United States participation in the Pan-American Games. In 1998, the responsibilities and authority of the USOC were again increased, this time to include overseeing and supporting participation in the Paralympic Games. (App. 27a-28a).[1]

The Paralympic Games are held immediately after the Olympic Games in the same host city and involve between 1,100 and 4,000 athletes. (App. 4a). The Paralympics provides competition for elite athletes belonging to six different disability groups: amputee, cerebral palsy, visual impairment, spinal cord injuries, intellectual disability, and certain others. (App. 43a-44a n.11). Many of the events at the Paralympics are the same as the competitions at the Olympics; the discus, javelin, shot, bow and arrow and other equipment used are the same at both events. Paralympic competitions are as physically

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[1] The Senate Report explained that "[t]he legislation would fully incorporate the Paralympics into the Amateur Sports Act" and "would give the USOC the same duties with respect to the Paralympic Games as it has with the Olympic Games." S.Rep. No. 105-325 at 2, 5 (1998).

demanding as competitions in the other Games; the Paralympic marathon, for example, certainly takes more strength and endurance than the Pan-American Games sport of bowling.

The plaintiffs in this action are elite Paralympic athletes who have competed in at least one Paralympic Games. All three have disabilities that cause them to use wheelchairs for mobility, and all compete as wheelchair racers. Petitioner Hollonbeck has won two gold medals and three silver medals and fifteen wheelchair marathons, and has held three United States and two World Records. At the 1992, 1996, and 2000 Olympics, at which wheelchair racing was an exhibition event conducted under the auspices of the International Olympic Committee, Hollonbeck competed on behalf of the United States. The USOC, however, would not permit Hollonbeck to participate with the United States team during the opening ceremonies, although wheelchair racers from other nations participated with their own teams. (JA 305-08).

The complaint alleges, and the USOC did not deny, that the USOC has a policy of denying to Paralympic athletes many of the benefits that are provided to participants in, or athletes preparing for, the Olympic and the Pan-American Games, and in some instances a policy of providing Paralympic athletes with inferior forms of those benefit. All of the Paralympians denied benefits, or accorded only inferior benefits, are disabled. Virtually all of the Olympic and Pan-American athletes who do receive those

benefits (or who receive the more generous benefits) are able-bodied. The USOC has been able to identify only two disabled athletes in the last century of Olympic competition who were members of a United States Olympic Team, one in 1906 and one in 2000.[2] The USOC has not identified a single disabled individual who has ever received benefits under the Basic Plus Grants, the Tuition Grants, or Operation Gold. The facts[3] regarding the nature of the discriminatory policies were essentially undisputed.

There are four principal benefits which the USOC provides to Olympic and Pan-American athletes but denies to Paralympic athletes. Athletes training for the Olympic or Pan-American Games can obtain these benefits even though those athletes have not yet been and may never be selected for those teams; conversely, even Paralympic athletes who are chosen as members of the United States Paralympic Team, including those who win medals, cannot receive any of these four benefits. Basic Grants and Basic Plus Grants are cash payments made directly (and only) to Olympic and Pan-American Game athletes. These grants are important because they

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[2] Those athletes were George Eyser, a 1906 gymnast, and Marla Runyan, a 2000 runner. The USOC was able to identify only two other disabled athletes who had ever competed in the Olympics: Neroli Fairhall from New Zealand and Terence Parkin from South Africa. Brief for Appellee, p. 21.

[3] The stipulated facts described the USOC practice at the time of the district court proceedings.

permit recipients to train full time for the Olympic and Pan-American Games; Paralympic athletes generally have to hold regular jobs and can train only in their spare time. Between 1997 and 2000 the USOC provided $26 million in such grants; none of those funds were paid to Paralympic athletes. The USOC Tuition Assistance Program makes payments to an athlete's college or university; Paralympic athletes are ineligible for those benefits. The USOC offers certain athletes an Elite Athlete Health Insurance Program; enjoyment of that benefit is limited as well to Olympic and Pan-American Games athletes.

There are two USOC programs under which Paralympic athletes received inferior benefits. The USOC has a program denoted "Operation Gold," under which substantial cash awards are made directly to athletes who win medals. Prior to 2000, only Olympic and Pan-American Game athletes received these payments. Since 2000, Paralympic medal winners receive cash awards under Operation Gold, but the benefits they receive are far smaller than those paid to Olympic medalists. Medalists at the Paralympic Games are paid awards about one-tenth the size of awards to Olympic medalists. (App. 35a-36a n.7). The USOC operates a number of USOC sports training centers. (JA 304). Use of these facilities is allocated on a priority basis. Olympic athletes get the first priority; Pan-American Games athletes get the second priority. Paralympic athletes can use the training facility only when no Olympic or Pan-American Game athlete wants to do so.

The USOC, and the courts below, referred to all of these discriminatory programs as the Athlete Support Programs.

The Proceedings Below

The complaint was filed in July 2003 in the District Court for the District of Colorado. The USOC does not dispute that it has received federal financial assistance, and thus is subject to the provisions of section 504 of the Rehabilitation Act, which forbid discrimination on the basis of disability.[4] In the litigation in the courts below, plaintiffs argued only that the level of benefits for the Paralympic athletes had to be "equitable" or in some sense "proportionate," not that they must invariably be identical to the benefits for Olympic and Pan-American Games athletes. (App. 36a).[5] The USOC insisted that under section 504

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[4] The USOC initially disputed the allegation that it had received federal financial assistance within the meaning of section 504. It subsequently stipulated that it had received such assistance. (App. 16a n.1).

Petitioners also alleged claims under the Americans With Disabilities Act; those contentions were rejected by the district court, and were not pursued on appeal. (App. 5a.).

[5] At the oral argument in the district court, counsel for plaintiffs reassured the court that the plaintiffs were not "demanding exactly the same thing" that was provided to Olympic and Pan-American Game athletes. (JA 449; see *id.* (benefits need not be "perfect[ly] identical")). Counsel indicated the plaintiffs were asking only that the USOC benefits be "allocat[ed] fairly." (*Id.*).

it is free to deny Paralympic athletes any benefits whatever.

In October 2003, the USOC moved under Rule 12(b)(6) to dismiss the complaint for failure to state a claim on which relief could be granted.[6] The USOC contended, and the Tenth Circuit ultimately held, that section 504 permits the USOC to deny the disputed benefits to Paralympic athletes regardless of the USOC's motive for doing so, and regardless of whether doing so advances, interferes with, or has no impact at all on the USOC's statutory responsibilities.

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[6] USOC contends, in arguments of counsel, that the inferior treatment accorded to Paralympic athletes was not motivated by any discriminatory or invidious purpose. Counsel for the USOC has argued at various times that there are five reasons why it needs to give preferential benefits to Olympic and Pan-American Game athletes: (a) greater benefits are needed to provide incentives for American athletes to seek to take part in the Olympics; (b) the grants and health insurance programs would be inefficient if Paralympic athletes were included; (c) the Olympic Team would be "strapped for cash" if Paralympic athletes got any of these benefits; (d) training for an Olympic competition is more expensive than training for the same event at the Paralympics; and (e) the Paralympic athletes were already winning so many medals without benefits that the Olympic Team needed the help more. Brief for Appellees, p. 53; Response to the Petition for Rehearing and Rehearing En Banc, p. 2; JA 487. The USOC did not, however, seek summary judgment regarding these contentions, or proffer affidavits or documentary material in support of them. Such a summary judgment motion would have raised a range of factual issues and could not have been filed until the completion of discovery.

The district court recognized that the actions of the USOC "relegate[] Paralympians to second class status in the quantity and quality of the benefits and support they receive from the USOC." (App. 47a). It nonetheless concluded that those disparities were lawful under section 504 without regard to the purpose or possible factual justification for such disparities. The court reasoned that under section 504 each of the Athlete Support Programs, as well as USOC activities regarding the Olympic, Pan-American and Paralympic Games, all "are separate programs across which differences in allocation are not discriminatory for the purposes of federal civil rights legislation because they are not comparable." (App. 38a). Because under the district court's interpretation of section 504 each of these functions was to be analyzed as a "separate program[]," that court concluded that the eligibility requirements for the various disputed USOC benefits – requirements which barred Paralympic athletes from the most important USOC benefits – were "beyond the reach of the . . . Rehabilitation Act." (App. 46a).

The central issue in the court of appeals was the meaning of the phrase "program or activity" in the section 504 prohibition against discrimination "under any program or activity receiving Federal financial assistance." Although section 504(b) defines "program or activity" to mean "all of the operations" of a recipient, the majority held that in the phrase "discrimination under any program or activity" the term "program" refers not to the recipient's actions "as a

whole," but rather to each separate subsidiary program created or operated by the recipient. (App. 10a). "The relevant universe for analysis under § 504 is the individual programs under the USOC's umbrella." (*Id.*). Under this interpretation of section 504, the court of appeals insisted, courts must examine separately, and can examine only, the actions *within* each distinct subsidiary program that a recipient has created.

The Tenth Circuit regarded this interpretation of section 504 as fatal to all of plaintiffs' claims. First, because, on the majority's view, the Olympics, the Pan-American Games and the Paralympics are distinct "programs" within the meaning of section 504, the Rehabilitation Act simply does not apply to USOC decisions to withhold from athletes training for or competing in the Paralympics benefits that are provided to athletes training for or competing in the Olympics or Pan-American Games. Decisions about the allocation of benefits *among* these separate groups of athletes are not decisions (and thus could not be discrimination) "*under*" a program. The Tenth Circuit did not hold that the USOC's actions were not discriminatory; rather, it construed section 504 as providing that these types of decisions – discriminatory or not – are not actions "under [a] program . . . receiving [f]ederal financial assistance" at all.

Second, the Tenth Circuit reasoned that the eligibility requirement that a recipient creates for a particular recipient program is not subject to scrutiny under section 504. Such an eligibility requirement,

the court reasoned, merely defines the contours of the recipient's program, and cannot therefore be action within or under that program. "[C]ourts are not free to rewrite eligibility requirements" for a recipient program because doing so would "alter[ ] the nature of the program." (App. 13a). Thus section 504 simply did not apply to the USOC's decision to declare Paralympians ineligible for most of the Athlete Support Programs, regardless of why the USOC had made that decision.

Judge Holloway, in a dissenting opinion, agreed with the majority that "resolution of these appeals turns on whether the USOC is operating one 'program' or separate programs, one for the disabled and one for the able-bodied." (App. 16a).[7] Judge Holloway insisted that the definition of "program or activity" under section 504 is controlled by section 504(b), which states:

> For the purposes of this section, the term "program or activity" means all of the operations of . . . an entire corporation . . . if assistance is extended to such corporation . . . as a whole.

29 U.S.C. § 794(b). He argued that under section 504 "'all the operations of' the covered entity" are a single program. (App. 16a) (*quoting* 29 U.S.C. § 794(b)). On

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[7] App. 17a ("The underlying issue . . . is whether, in examining the USOC's challenged activities, we should consider the USOC as operating a single program or several separate ones.").

this interpretation of section 504, he concluded, the disputed decisions were subject to scrutiny under the Rehabilitation Act. Applying that definition of "program or activity," Judge Holloway readily concluded that an arrangement under which specific valuable benefits are provided only to Olympic and Pan-American athletes (virtually all of them able-bodied), and are denied to every Paralympic athlete (all of whom are disabled), constitutes disability-based discrimination. (App. 18a).

Petitioners sought rehearing and rehearing en banc. The panel denied the petition for rehearing by a vote of 2-1; Judge Holloway would have granted the petition. Petitioners also sought rehearing en banc. Judges Henry, Briscoe, Lucero, Murphy, Hartz and O'Brien voted to grant rehearing en banc. (App. 72a-73a). Judge Holloway, who had voted to grant rehearing by the panel, was not eligible to vote on the petition for rehearing en banc because he held senior status.[8] Six active members of the court of appeals opposed rehearing en banc. The petition for rehearing en banc was thus denied by a 6-6 tie vote.

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[8] Rule 35(a) of the Federal Rules of Appellate Procedure permits only "judges . . . in regular active service" to vote on whether rehearing en banc should be granted.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CIVIL RIGHTS LAW THAT SHOULD BE SETTLED BY THIS COURT

For more than four decades, prohibitions against discrimination by entities receiving federal funds have been an essential element of national civil rights policy. Today there are twenty-nine federal laws, including in the instant case section 504 of the Rehabilitation Act, which in essentially identical terms forbid "discrimination under" a "program or activity" receiving federal financial assistance.[9] The anti-discrimination statutes framed in these terms prohibit discrimination on the basis of race, national origin, sex, pregnancy, age, religion, creed, political affiliation or belief, and disability.

The decision of the Tenth Circuit in the instant case substantially limits the protections of these laws, carving out a set of potentially discriminatory decisions which are immune from scrutiny under section 504. Six members of the Tenth Circuit, correctly recognizing that the issue in this case is one of "exceptional public importance," Tenth Circuit Rule 35.1(A), voted for rehearing en banc.

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[9] A list of those statutes is set forth in an appendix to this petition.

Section 504, like numerous other federal laws, forbids discrimination "under any program or activity" receiving federal financial assistance. Most recipients of federal assistance, like the respondent USOC, engage in a range of functions and set up a variety of subsidiary programs. The question presented, and of potential importance to all of these statutes, is whether those laws apply only to decisions made *within* each of those distinct subsidiary recipient-created programs, or more broadly forbid discrimination in a recipient's operations "as a whole."[10]

The definition of "program" under section 504 (and other, identically worded federal statutes) is of considerable importance because it determines the nature of the anti-discrimination prohibition. Section 504 forbids only discrimination "under" a federally assisted "program." If a recipient's various separate functions each constitute distinct "program[s]" within the meaning of section 504, the Rehabilitation Act would indeed prohibit only discrimination *within* each such subsidiary program.

The decision of the Tenth Circuit, construing "program" to mean "recipient program," expressly excludes from "analysis" (App. 10a) or scrutiny under

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[10] The courts below in addressing this issue drew no distinction between "program" and "activity," and framed the question before them as whether each of the benefits provided by the USOC constitutes a separate program, rather than a separate program or activity.

section 504 two important – and potentially discriminatory – types of actions by a recipient of federal financial assistance. (App. 11a). First, because on the Tenth Circuit's view section 504 forbids only discrimination *within* a particular recipient-created program, section 504 would not apply to discrimination by a recipient in the allocation of a benefit *between* two or more programs. If a recipient operated or organized its beneficiaries into two programs, in one of which all participants were disabled and in the other of which no participants were disabled, section 504 would not apply to the recipient's decision to allocate resources only, or preferentially, to the latter. That would be true even where, as here, the recipient's own actions are responsible for the composition of the two groups of program participants. Under the Tenth Circuit's interpretation of "program or activity," section 504 would not apply to such a decision, even though it would have a severe discriminatory effect, and regardless of whether the recipient was motivated by a discriminatory purpose.

Second, the Tenth Circuit holds that construing "program" to mean "recipient program" means that the eligibility requirements for each such program (unless facially discriminatory[11]) also are not subject

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[11] Under the Tenth Circuit decision a subsidiary program would violate section 504 if it imposed a facially discriminatory eligibility requirement, e.g., if the USOC established a scholarship program for "non-disabled Olympians." (12a, 14a). The court of appeals' view of what constituted facial discrimination was exceedingly narrow; it insisted that USOC rules are not

(Continued on following page)

to scrutiny or analysis under section 504. (App. 13a). On the Tenth Circuit's view, the eligibility standard is part of the essence of the program to which it controls entry, and thus cannot be scrutinized under section 504. (*Id.*). Thus an excluded would-be participant cannot challenge the eligibility requirement for a recipient program either on the ground that it was adopted with a discriminatory purpose, or on the ground that it has a discriminatory effect.

The circumstances of the instant case are a stark illustration of the impact and importance of whether the phrase "program or activity" in section 504 (and the other identically worded federal laws) applies only (and separately) to the conduct of such recipient subsidiary programs. The USOC provides coordination and assistance to several thousand American athletes who take part in international competitions. Virtually all of the recipients of the most valuable direct aid – grants, scholarships, and health insurance – are able-bodied; not a single Paralympian – every one of whom, by definition, is disabled – receives any such benefits. In 1997-2000 the USOC made $26 million in grants to Olympic and Pan-American Game athletes, but not a single such grant

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facially discriminatory when they deny benefits to Paralympians (who under the relevant governing body rules had to be disabled), while granting such benefits only to Olympic and Pan-American Game athletes (who are chosen pursuant to governing body rules under which disabled athletes, in practice, can virtually never be selected.).

to any Paralympic Games competitors. If the USOC support (or lack thereof) for the athletes for whom it has statutory responsibility is considered "as a whole" and thus constitutes a single program under section 504 (in the words of the court below, if "the relevant universe for analysis is all amateur athletes over which the USOC has responsibility"), the USOC's actions would be a classic violation of the Rehabilitation Act absent a compelling factual showing – which the USOC has not yet attempted to make – that this extraordinary disparity is required to meet the USOC's statutory responsibilities.

Under the Tenth Circuit's interpretation of section 504, there would be few significant limitations on the degree or manner in which the USOC could discriminate against disabled Paralympic athletes. If the USOC support for the groups of athletes competing in the three international Games constitutes distinct programs under the Rehabilitation Act, section 504 would be virtually meaningless; it would forbid only disability-based discrimination within the Olympic Games "program" (among Olympic athletes, virtually all of whom are able-bodied), within the Pan-American Games "program" (among Pan-American athletes, virtually all of whom are able-bodied) or within the Paralympic Games "program" (among Paralympic athletes, all of whom, by definition, are disabled). Nothing in section 504 would bar the USOC, for example, from refusing to provide Paralympic athletes reimbursement for the travel and housing expenses involved in participating in the

Paralympics Games or from eliminating Paralympic funding altogether.

The decision of six members of the Tenth Circuit to support rehearing en banc reflected a well-founded recognition of the importance of the panel's decision. The very nature of disabilities dictates that benefits, programs and activities for disabled individuals will frequently be provided at a different location, or in a different form, or under different auspices, than is the case for those who are not disabled. The Tenth Circuit decision permits recipients to characterize or structure those benefits as separate "programs," and then reduce or eliminate the benefits in the programs used by disabled, but not non-disabled, individuals.

Vocational training for workers who have lost their sight will be distinct from (and often at a different location than) vocational training for workers who have lost their jobs to outsourcing. The program providing medical benefits for an accident victim left paralyzed will be distinct from (and usually provided in a different unit than) the program providing benefits for the victim who suffered only scratches and bruises. Certain highly debilitating illnesses will require specialized forms of physical therapy distinct from the physical therapy non-disabled individuals may need for sprained ankles or broken arms. Pretrial detainees or prison inmates may for security reasons be held in separate detention units.

Under the Tenth Circuit decision, those differences would permit a recipient to characterize the

systems for providing benefits to the disabled as separate "programs," and then to discriminate against the disabled would-be beneficiaries by providing them with lesser benefits, or no benefits at all. The very fact that people with disabilities must at times receive certain benefits separately would, paradoxically, permit recipients to relegate individuals in need of such programs, in the words of the district court here, to "second class status." (App. 47a).

The decision below construing the phrase "program or activity receiving federal financial assistance" is equally applicable to all of the twenty-eight other federal laws that use that identical language. The Tenth Circuit decision did not purport to be based on any unique language in the Rehabilitation Act; the terms of that statute are indistinguishable from the other twenty-eight similar federal laws. The decision below does not rely on either the legislative history of the Rehabilitation Act, or any federal regulation construing that Act.

As this Court has repeatedly noted, section 504 was based on the similarly worded provisions of Title VI of the 1964 Civil Rights Act,[12] which forbids discrimination on the basis of race, color, or national origin under any federally assisted program or activity. For that reason, section 504 and Title VI are usually construed in the same manner. Similarly, the Court has recognized that Title IX of the Education

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[12] 42 U.S.C. § 2000d *et seq.*

Act Amendments of 1972,[13] which forbids gender-based discrimination under federally assisted education programs, also derives from and is to be interpreted in light of Title VI.[14]

The Tenth Circuit decision opens the door to discrimination on the basis of race, color, national origin and gender in the same way in which it permits that discrimination under section 504. Within individual school districts it is common for some schools to be overwhelmingly white, and others to be overwhelmingly non-white. Under the decision below, a school district could deem particular schools to be different programs (they have different locations and staffs, and usually have different geography-based eligibility requirements); having done so, the school district's decisions to provide benefits to some schools but not others would be immune from scrutiny under Title VI. Similarly, higher education systems in the South often include one or more colleges or universities which are overwhelmingly white and others which are predominantly non-white. Under the Tenth Circuit's interpretation of "program," the largely

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[13] 20 U.S.C. § 1681.

[14] *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (Title VI and Title IX); *NCAA v. Smith*, 525 U.S. 459, 467 (1999) (Title IX and section 504); *School Board of Nassau County v. Arline*, 480 U.S. 273, 278 n.2 (1987) (Title VI and section 504); *United States Dept. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 605 (1986) (Title VI, Title IX, and section 504); *Cannon v. University of Chicago*, 441 U.S. 677, 694-95 (1979) (Title VI and Title IX).

white University of Mississippi would constitute a different program than the overwhelmingly black Jackson State University.[15] If Mississippi officials were to decide to provide scholarships and medical insurance only to University of Mississippi students, the Tenth Circuit decision would immunize that decision from examination under Title VI.

The Tenth Circuit decision would have a similar impact on the effectiveness of Title IX. At many schools, for example, men are over 90% of the students in certain majors (e.g., mechanical engineering), while women constitute a similar proportion of other majors (e.g., nursing). Under the decision below, a university could decide to accord medical insurance to mechanical engineering students but not nursing students, or to give mechanical engineering students preferential status in access to library carrels or desirable student jobs. As we explain below, under the Tenth Circuit's interpretation of Title IX, a school could largely abolish women's sports by the simple expedient of permitting women to try out for all the traditional men's teams. Under the Tenth Circuit's interpretation of "program," all of these decisions would be immune from scrutiny under Title IX.

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[15] That would be true even though Title VI, in language identical to section 504(b), defines "program or activity" to mean "all the operations of . . . a public system of higher education." 42 U.S.C. § 2000d-4a(2)(A). It is precisely this "all operations of" language which, over Judge Holloway's dissent, the majority refused to apply in the instant case.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER THAT CONFLICTS WITH DECISIONS OF THIS COURT

Judge Holloway correctly objected that the decision of the Tenth Circuit was in square conflict with this Court's decision in *Alexander v. Choate*, 469 U.S. 287 (1985). (App. 18a).

Under the decision below the action of the USOC in, for example, denying scholarships to Paralympic athletes, was lawful only because it was carried out in a particular manner. If the USOC had created a tuition program open to participants in all three Games, but then used a preference for Olympic and Pan-American Games athletes as a method of selection, that would have been subject to scrutiny both with regard to whether it was the result of a discriminatory motive and under the section 504 regulation forbidding use of selection "criteria . . . [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap." 28 C.F.R. § 41.51(b)(3). Thus the USOC could have violated section 504 if it had created a tuition grant program open to Olympic, Pan-American and Paralympic athletes, but then administered that program in a biased manner – e.g., giving extra points to Olympic and Pan-American (but not Paralympic) athletes, *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), or reserving a fixed number of scholarships only for Olympic and Pan-American athletes and assigning the awarding of those grants to a separate committee.

Regents of Univ. of California v. Bakke, 438 U.S. 265, 271, 273 n.1 (1978). A program open to all but covertly administered in a discriminatory manner could have violated section 504, even though at least some Paralympic athletes might have received some tuition grants.

Under the Tenth Circuit decision, however, the USOC was able to achieve the same result – or worse – by overtly reserving all of the tuition grants to Olympic and Pan-American athletes, and expressly declaring that very purpose of this exclusionary system was to benefit only Olympic and Pan-American athletes. As Judge Holloway correctly objected, the majority opinion

> exonerates the USOC for doing just what the Supreme Court instructs must *not* be done – defining the benefit "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled. . . ." *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

(App. 18a) (emphasis in original).

The effect of the Tenth Circuit decision is that the exclusion of Paralympic athletes may be forbidden if achieved in one way (by subjective student-by-student preferences in a tuition grant program open to all), but is permitted if a different technique is used (by declaring that Paralympic athletes simply were not eligible for those grants). Affording to a recipient the option of evading its section 504 obligations in that

manner is clearly inconsistent with this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984):

> [A recipient's] choice of administrative mechanisms, we hold, neither expands nor contracts the breadth of the "program or activity" . . . that may be regulated under Title IX.

465 U.S. at 572.

The central textual issue raised by this case (and common to Title VI, Title IX, and the Age Discrimination Act[16]), is that section 504(b) expressly "define[s]" "program or activity." The relevant portion of that definition provides that

> [f]or the purposes of this section, the term "program or activity" means all the operations of . . . an entire corporation . . . if assistance is extended to such corporation . . . as a whole. . . .

29 U.S.C. § 794(b). The Tenth Circuit agreed that this definition controls *which* USOC operations (all of them) are covered by section 504. Thus in the phrase "program or activity receiving Federal financial assistance," the court of appeals acknowledged, "program" means "all of the operations" of a recipient. (App. 13a). The Tenth Circuit insisted, however, that the section 504(b) definition did not

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[16] 42 U.S.C. § 6101 *et seq.*

apply to what *constitutes* forbidden discrimination. Thus in the phrase that delineates that prohibition, "discrimination under any program," the court of appeals held, the term "program" means each recipient program. (App. 10a).

The fatal flaw in this distinction is that the phrases "program or activity receiving Federal financial assistance" and "discrimination under any program or activity" are not in separate subsections of section 504, or even in separate sentences. Rather, these phrases are merely slightly different excerpts from a single sentence, which states that no person

> shall, solely by reason of her or his disability, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a). The first phrase consists of the seven words beginning with the word "program," and the second phrase consists of the six words ending with the word "activity." The term "program" appears only once in section 504(a), yet under the Tenth Circuit that word has two very different meanings, one (from section 504(b)) insofar as that term determines which recipient operations are within the scope of section 504, and a different one (recipient program) insofar as that term delineates what practices are forbidden.

The decisions of this Court have recognized that a single statutory term could be sufficiently broad or ambiguous as to be capable of having two or more

conflicting meanings. But this Court has without exception insisted that the Courts must choose between those competing interpretations. E.g., *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201, 2208 (2007) (choosing among the "many meanings" of "willfully"); *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffler*, 537 U.S. 371, 384 (2003) (choosing among the "many meanings" of "other legal process"); *Gutierrez v. Ada*, 528 U.S. 250, 256 (2000) (choosing among the "many meanings" of "any election"); *Babbitt v. Sweet Home Chapter of Community for a Greater Oregon*, 515 U.S. 687, 711 (1995) (choosing among the "many meanings" of "direct.")

III. THE DECISION OF THE TENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS

In *Rodde v. Bonta*, 357 F.3d 988 (9th Cir. 2004), the Ninth Circuit applied the standard in *Alexander v. Choate* to invalidate a disparity in funding and benefits created by the differing treatment of distinct programs. The defendant county in *Rodde* initially operated six hospitals, five of which provided general medical services (and which were and remained open to disabled patients) and one of which provided specialized services particularly likely to be needed by patients with disabilities. Facing a budgetary crisis, the county decided to close the specialized hospital and the programs it provided. Individuals who might otherwise have gone to the closed hospital

were free to seek admission to or treatment from the programs at the five remaining hospitals – that is, there was no discrimination within each remaining program – but if they required certain specialized services they would be turned away because those remaining hospitals did not provide such services. 357 F.3d at 991-92, 993, 997-98.

The Ninth Circuit held that the resulting disparity violated the holding of *Alexander v. Choate*.

> *Alexander* may allow the County to step down services equally for *all* who rely on it for their healthcare needs, but it does not sanction the wholesale elimination of services relied upon disproportionately by the disabled because of their disabilities.

357 F.3d 997. The attempts by the court below to distinguish *Rodde* are entirely unpersuasive. The Tenth Circuit asserted that *Rodde* was distinguishable because the defendant there had cancelled the benefits in question, whereas the USOC had merely decided not to create the disputed benefits. (App. 9a-10a). It noted that the benefits at issue in *Rodde* had earlier been consolidated into one program; in the instant case that had not occurred because the USOC had never provided the disputed benefits in any form to Paralympic athletes. The Tenth Circuit noted that *Rodde* involved "the provision of health . . . services" rather than, as here, health insurance. (App. 9a). The Tenth Circuit offered no explanation of why any of these differences would be legally relevant, and none is readily imaginable.

The Tenth Circuit also suggested that *Rodde* was distinguishable because the hospital that the county proposed to close, and the various treatment units and wards, did not constitute a "program." For example, on this view "Operation Gold" would be a program, but not the hospital medical unit providing actual operations (for pediatric orthopedic neuromuscular disorders). See 357 F.3d at 990. The Tenth Circuit proffered no definition of "program" that could justify such a distinction.[17] The Tenth Circuit describes the defendant in *Rodde* as having "cancell[ed] . . . services for the disabled." (App. 10a). But that defendant did not announce that the disabled could not have services which were open to the non-disabled; rather, in *Rodde*, as here, the defendant was merely proposing a facially neutral decision not to provide a benefit of particular importance to the disabled. In *Rodde*, however, the benefits to be withheld were in at least some instances utilized by (and thus to be withdrawn from) non-disabled individuals; in the instant case, on the other hand, *only* disabled individuals were affected by the disputed decision to deny benefits to the Paralympic athletes.

In *Klinger v. Department of Corrections*, 107 F.3d 609 (8th Cir. 1997), the Eighth Circuit did precisely

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[17] In *Rodde* both the county and the court had characterized units within the hospital in question as "programs." 357 F.3d at 992-93 n.3 ("Pressure Ulcer Management Program" at the hospital), 998 ("specialized programs for the disabled.").

what the Tenth Circuit (over Judge Holloway's dissent) refused to do in the instant case. The Eighth Circuit used the definition of "program or activity" in the 1987 Civil Rights Restoration Act – codified in 42 U.S.C. § 794(b) for the Rehabilitation Act and in 20 U.S.C. § 1687 for Title IX – to evaluate the merits of a discrimination claim. In *Klinger* the plaintiffs claimed that certain disparities in the education benefits accorded to male and female prisoners in the Nebraska prison system constituted sex "discrimination under [a] program or activity" receiving federal financial assistance. In deciding that claim, the Eighth Circuit compared the benefits available at the women's prison with those in "the Nebraska prison system as a whole." 107 F.3d at 615. The Eighth Circuit reasoned that a comparison with the system "as a whole" – the very mode of analysis rejected by the Tenth Circuit in the instant case – was required by the Title XI definition of "program or activity," which is identical to the definition in section 504(b) relied on by Judge Holloway. That definition

> requires comparison of educational opportunities for female and male prisoners within the entire system of institutions operated by a state's federally-funded correctional department or agency, taking into account the objective differences between the male and female prison populations and such penological and security considerations as are necessary to accommodate this unique context.

107 F.3d at 616.

The Tenth Circuit correctly stated the holding in *Klinger*. Under the reasoning in *Klinger*, the panel acknowledged,

> the USOC's three programs should only be compared considering the significant distinctions between each program in purpose, scope, success, and all other relevant differences.

(App. 9a). Having recognized that the Eighth Circuit decision in *Klinger* requires a context-specific comparison of *all* the recipient's operations, the Tenth Circuit opinion inexplicably refused to engage in such a comparison, in light of relevant distinctions, of the benefit levels in the USOC programs for Paralympic athletes, Olympic athletes, and Pan-American athletes. The court below neither argued that the Eighth Circuit's requirement of such a comparison – which is what plaintiffs in the instant case had sought – was mistaken, nor suggested that the holding in *Klinger* could be distinguished from the dispute in the instant case.

The Tenth Circuit understood that under decades of circuit court decisions under Title IX a school could not, for example, limit scholarships to football students. Under the Tenth Circuit decision, however, a school's football team, or football scholarships, assuredly could be treated as a separate "program." The panel's attempt to distinguish the entrenched interpretation of Title IX – under which all of a school's sports activities are properly regarded as a single

program – merely underlined the radical reinterpretation of "program or activity" in the decision below.

The court of appeals argued that under Title IX "separation based on gender may be necessary, *thus* requiring an institution-wide analysis to determine whether a Title IX violation has occurred." (App. 10a) (emphasis added). On Tenth Circuit's new construction of Title IX, institution-wide analysis of a school's sports program would only be warranted where the school required separate teams based on gender. But under the Tenth Circuit decision, Title IX would be rendered largely inapplicable to a school's sports program if the school opted to permit girls or women to try out for and (if successful) play on boys' or men's teams, even if in practice few girls or women might seek to do so and few of them might ever succeed. That loophole is far from hypothetical. In fact, many schools have already abandoned prohibitions against female athletes trying out for traditional boys' or men's teams. Under the Tenth Circuit decision, a school could effectively escape its Title IX obligations – thus be able to shift all its scholarship funds to football and men's basketball or largely eliminate girl's teams – by the simple expedient of declaring women and girls eligible for the traditional men's or boys' teams.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SCOT HOLLONBECK; JOSE ANTONIO INIGUEZ; JACOB WALTER JUNG HO HEILVEIL; VIE SPORTS MARKETING, INC., a Georgia corporation, Plaintiffs-Appellants, v. UNITED STATES OLYMPIC COMMITTEE, a federally-chartered corporation; U.S. PARALYMPICS, INC., f/k/a United States Paralympic Corporation, a Colorado non-profit corporation, Defendants-Appellees, and MARK E. SHEPHERD, SR., Plaintiff-Appellant, v.	No. 07-1053 and 07-1056

UNITED STATES OLYMPIC COMMITTEE, a corporation,

Defendant-Appellee.

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; DISABILITY RIGHTS ADVOCATES; NATIONAL FEDERATION OF THE BLIND; LEGAL CENTER FOR PEOPLE WITH DISABILITIES; RAFAEL IBARRA; KARIN KORB; TATYANA McFADDEN,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. Nos. 03-cv-1364-JLK and 99-CV-02077-JLK)

Amy Robertson of Fox & Robertson, P.C., Denver, Colorado (and Timothy P. Fox of Fox & Robertson, P.C., Denver, Colorado; Kevin W. Williams, Legal Program Director of Colorado Cross Disability Coalition, Denver, Colorado, with her on the briefs), for Plaintiffs-Appellants.

Christopher Handman of Hogan & Hartson, L.L.P., Washington, D.C. (Jeffrey S. George, John W. Cook, and Anne H. Turner of Hogan & Hartson, L.L.P.,

Colorado Springs, Colorado, with him on the brief), for Defendants-Appellees.

Samuel R. Bagenstos, St. Louis, Missouri, filed a brief for Amici Curiae.

Before **KELLY**, **HOLLOWAY**, and **HOLMES**, Circuit Judges.

KELLY, Circuit Judge.

In these consolidated appeals, paralympic athletes appeal the district court's dismissal of their claims under § 504 of the Rehabilitation Act against the United States Olympic Committee ("USOC"). In 07-1053, Plaintiffs-Appellants Scot Hollonbeck, Jose Antonio Iniguez, and Jacob Walter Jung Ho Heilveil appeal the district court's grant of a motion to dismiss in favor of the USOC on their § 504 claim. In 07-1056, Plaintiff Mark Shepherd appeals the district court's grant of summary judgment in favor of the USOC on his § 504 claim. As both cases raise identical legal issues, we consolidated the cases for briefing and submission. Prior to our disposition, Mr. Shepherd and the USOC stipulated to a dismissal of the appeal in 07-1056 under Fed. R. App. P. 42(b). Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

The USOC is a federally-chartered corporation that has exclusive jurisdiction over U.S. participation

in three athletic competitions: the Olympic Games, the Paralympic Games, and the Pan American Games. 36 U.S.C. §§ 220502, 220503(3)(A). Under the Ted Stevens Olympic and Amateur Sports Act ("ASA") as amended, *id.* §§ 220501-220529, Congress has charged the USOC to "obtain for the United States, . . . the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games, and the Pan-American Games." *Id.* § 220503(4).

The first Paralympic Games were held in 1960. Now the Paralympic Games immediately follow the Olympic Games in the same host city and involve between 1,100 and 4,000 athletes. Plaintiffs are all elite paralympic athletes who have competed in at least one Paralympic Games. Plaintiffs are wheelchair racing paralympians. U.S. Paralympians have been very successful compared to their Olympic counterparts with 42% of the Paralympians winning medals in 2000 and 75% winning medals in 2002 (compared to 16% of Olympians winning medals in both 2000and 2002). Aplt. App. at 241.

To achieve its mission under the ASA, the USOC provides Athlete Support Programs which include various types of grants, tuition assistance, and health insurance benefits. The criterion that the USOC uses to distribute the benefits under its Resource Allocation Policy is that the applicant must be an athlete who is eligible to represent the United States and who intend[s] to compete, if selected, in the next Olympic or Pan American Games. *Id.* at 110.

Plaintiffs challenge the USOC's policy of providing Athlete Support Programs only to Olympic team members, to the exclusion of Paralympic team members, as violating § 504 of the Rehabilitation Act. The district court consolidated two separate cases for oral argument which the parties and the court agreed raise identical legal issues under Title III of the Americans with Disabilities Act ("ADA"), and § 504 of the Rehabilitation Act: *Hollonbeck v. USOC*, No. 07-1053, on a motion to dismiss; and *Shephard v. USOC*, No. 07-1056, on cross-motions for summary judgment. The district court ruled for the USOC on the Title III and § 504 claims in both cases and entered final judgment pursuant to Fed. R. Civ. P. 54(b) on those claims. Prior to our disposition, Mr. Shepherd and the USOC stipulated to the dismissal of the appeal in 07-1056 pursuant to Fed. R. App. P. 42(b). Plaintiffs Hollonbeck, Iniguez, and Heilveil only appeal the district court's dismissal of their § 504 claims.

On appeal, Plaintiffs argue that (1) the relevant universe for analysis should be all amateur athletes over which the USOC has responsibility; (2) they are "otherwise qualified" for the Athlete Support Programs; (3) the USOC's policy discriminates against them; and (4) the USOC's policy has the effect of screening out amateur athletes with disabilities.

Discussion

We review the grant of a motion for summary judgment de novo, applying the same standard as the

district court. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1112-13 (10th Cir. 2007). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the grant of a Rule 12(b)(6) motion to dismiss de novo as well, considering whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1974 (2007). All facts alleged in the *Hollonbeck* complaint are assumed to be true in reviewing the motion to dismiss. The parties stipulated to a set of facts in *Shepherd* for the purpose of the cross-motions for summary judgment. Aplee. Br. at 5 n. 1. Because the facts are undisputed, we consider whether Plaintiffs state a claim or whether the USOC is entitled to judgment as a matter of law.

Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a). A prima facie case under § 504 consists of proof that (1) plaintiff is handicapped under the Act; (2) he is "otherwise qualified" to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminates against plaintiff. *Powers v.*

MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999).

Plaintiffs first argue that the relevant universe for analysis is all amateur athletes over which the USOC has responsibility, and the district court erred in restricting its discrimination analysis to the Olympics. Plaintiffs argue that the ASA's use of the term "amateur athlete" and § 504's definition of "program or activity," in light of the history of the definition and precedent applying Title IX, compel an analysis of the USOC programs for Olympic, Pan American, and Paralympic athletes as a whole. Thus, Plaintiffs argue that we should compare the USOC's treatment of all amateur athletes, no matter the competition in which they compete.

The ASA defines "amateur athlete" to be "an athlete who meets the eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes." 36 U.S.C. § 220501(b)(1). In 1998, the ASA was amended to give the USOC jurisdiction and responsibility over United States participation in the Paralympic Games in addition to the Olympic and Pan American Games. *See* 36 U.S.C. § 220503; S. Rep. 105-325 (1998). However, the ASA as amended does not direct the USOC's activities in any detail with respect to Olympic or Paralympic athletes other than requiring it to "obtain . . . the most competent amateur representation possible in each event" of the three competitions. 36 U.S.C. § 220503(4). The mere use of the term "amateur athlete" in the statute does

not enlarge the relevant universe to include all athletes under the USOC's purview.

The cases that Plaintiffs rely upon also do not support analyzing the USOC's three programs as a whole. First, Plaintiffs rely on *Klinger v. Department of Corrections,* where women prisoners sued the Nebraska Department of Corrections under Title IX for failing to provide equal educational opportunities for male and female prisoners. 107 F.3d 609, 611 (8th Cir. 1997). The prisoners compared the educational opportunities available at their facility with the opportunities available at one specific male facility. *Id.* at 612. The court rejected the comparison holding that Title IX requires comparison of opportunities for male and female prisoners within the entire prison system taking into account the objective differences between the two populations and other relevant penological and security considerations. *Id.* at 615-16.

Plaintiffs' reliance on *Klinger* to alter § 504's definition of program or activity is misplaced.[1] The

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[1] In *Grove City College v. Bell,* the Supreme Court held that receipt of federal funds by a college's financial aid office did not trigger institution-wide Title IX coverage because the financial aid office was the "program or activity receiving Federal financial assistance." 465 U.S. 555, 570-72 (1984) (quoting 20 U.S.C. § 1681(a)). The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, abrogated the Supreme Court's holding in *Bell* and broadened the Court's narrow definition of "program or activity" to expand the application of Title IX, the Rehabilitation Act, Title VI, and the Age Discrimination Act to an entire institution if any part of the institution receives federal funds.

(Continued on following page)

case only holds that, under Title IX, the comparison between only the female facility and one specific male facility is not meaningful. *See id.* 615-16. A meaningful comparison requires viewing the jails in the context of the security, penological, and size differences among the various facilities. This holding does not support Plaintiffs' theory, and the reasoning in *Klinger* contradicts Plaintiffs' argument. The court noted that differences in programs between jails are permissible when considering the different circumstances in each jail. *See id.* at 616. Thus, the case's reasoning suggests that the USOC's three programs should only be compared considering the significant distinctions between each program in purpose, scope, success, and all other relevant differences.

Plaintiffs also rely on two ADA cases to suggest an analysis of the USOC as a whole: *Rodde v. Bonta,* 357 F.3d 988 (9th Cir. 2004), and *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach,* 846 F. Supp. 986 (S.D. Fla. 1994). Both cases are readily distinguishable because they involve the consolidation of services for the disabled at a single facility and then cancellation of those services. *See Rodde,* 357 F.3d at 998 (noting these similarities in these two cases). These cases did not involve separate programs with separate eligibility requirements – they involved the provision of health and recreation services

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There is no dispute that the Rehabilitation Act applies to all of the USOC's programs, so this analysis is inapposite here.

and the cancellation of those services for the disabled on a county-wide basis. *Cf. Does 1-5 v. Chandler,* 83 F.3d 1150, 1155 (9th Cir. 1996) (concluding that a Hawaii general assistance program is functionally two programs – one for needy families and one for the needy disabled – and holding that "[t]he ADA does not require equivalent benefits in different programs"). Nothing in the analysis of these two cases supports a conclusion that the USOC's programs should be analyzed as a whole.

The additional Title IX precedent cited by Plaintiffs is not applicable here because it is based on a regulatory framework unique to the Title IX context. Title IX regulations recognize that separation based on gender may be necessary thus requiring an institution-wide analysis to determine whether a Title IX violation has occurred. *See e.g.,* 34 C.F.R. § 106.41(b), (c); *Roberts v. Colo. State Bd. of Agric.,* 998 F.2d 824, 829-32 (10th Cir. 1993). Therefore, the relevant universe for analysis under § 504 is the individual programs under the USOC's umbrella. Plaintiffs must show that they are otherwise qualified for the Athlete Support Programs and that the program discriminates against them.

Second, Plaintiffs argue that they are "otherwise qualified" for the Athlete Support Programs because they are amateur athletes under the ASA. A plaintiff is "otherwise qualified" under the Rehabilitation Act if he "is able to meet all of a program's requirements in spite of his [disability]." *Se. Cmty. Coll. v. Davis,* 442 U.S. 397, 406 (1979). Normally, if a plaintiff is

unable to meet a program's requirements, a court must consider whether reasonable modifications or accommodations may be made that do not fundamentally alter the program. *See Sch. Bd. of Nassau County, Fla. v. Arline,* 480 U.S. 273, 288 n. 17 (1987); *Alexander v. Choate,* 469 U.S. 287, 300 (1985). Plaintiffs' argument requires us to accept a premise that we already rejected, namely, that the relevant universe for analysis is all amateur athletes. In the alternative, Plaintiffs contend that the requirement of being on the Olympic team is not an "essential eligibility requirement" to qualify for the Athlete Support Programs. 28 C.F.R. § 41.32(b). Plaintiffs argue that the USOC could open the benefits to Paralympic athletes and that doing so would further the USOC's program as a whole. However, § 504 is not the vehicle to compel discretionary acts of administrators absent discrimination.

Third, Plaintiffs argue that the USOC's policy of excluding Paralympic athletes from Athlete Support Programs is both facially discriminatory and discriminatory by proxy. Even if Plaintiffs were "otherwise qualified" for the benefits, the USOC's policy does not discriminate against Plaintiffs by reason of their disability. First, Plaintiffs err in contending that the eligibility requirements for the Athlete Support Programs are intentionally discriminatory. The criterion that the USOC uses to distribute the benefits under its Resource Allocation Policy is that the athlete must be "eligible to represent the United States and . . . intend to compete, if selected, in the

next Olympic or Pan American Games." The policy, on its face, clearly does not contain an explicit requirement of not being disabled. *Cf. Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995) (considering a city zoning ordinance for group homes for the disabled that "facially single[d] out the handicapped and appl[ied] different rules to them").

Plaintiffs also contend that the program discriminates against Paralympic athletes by proxy as the policy specifically excludes Paralympic athletes and the term "Paralympic athletes" is a proxy for amateur athletes with disabilities. The designation of "Olympic athlete" as a requirement for Athlete Support Programs is not a proxy for non-disabled athletes because there is no fit between being an Olympic athlete and not being disabled. The requirement of being an Olympic athlete is not "directed at an effect or manifestation of a handicap." *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992). Thus, the requirement to be an Olympic athlete to be eligible for the Athlete Support Programs is not discriminatory to Paralympic athletes "by reason of [their] disability." *See* 29 U.S.C. § 794(a).[2]

Fourth, Plaintiffs argue that the USOC's policy has the effect of screening out amateur athletes with

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[2] Plaintiffs also refer in their briefs to a "separate benefit" regulation in 28 C.F.R. § 41.51(b)(1)(iv), and note that it is irrelevant to our analysis. We agree that it is irrelevant to our analysis for a different reason – Plaintiffs are not "qualified" as required by the regulation.

disabilities. Plaintiffs' argument appears to allege that the USOC's policy impermissibly creates a disparate impact on disabled athletes, thus violating § 504. The Supreme Court has held that disparate impact, by itself, does not state a prima facie case under § 504. *Choate,* 469 U.S. at 299. Rather, actionable disparate impact requires analysis of whether the individual is otherwise qualified and whether reasonable accommodations may provide meaningful access. *See id.* at 299-301. Plaintiffs raise no additional argument here that we do not address above.

The dissent concludes that Plaintiffs are "otherwise qualified" for the Athlete Support Program because § 504 defines "program or activity" to include "all of the operations of" a covered entity. 29 U.S.C. § 794(b). However, Congress included the phrase "all of the operations of" a covered entity in § 504 to ensure that § 504 applies to an institution as a whole once any part of the institution receives federal funds. *See supra* note 2; *see also DeVargas v. Mason & Hanger-Silas Mason Co.,* 911 F.2d 1377, 1384-85 (10th Cir. 1990). The phrase does not create a parity requirement across an institution's individual programs (unlike the requirements under the specialized Title IX regulations). Further, the dissent's reading of the statute would change the eligibility requirements set by the USOC – being an Olympic team member – altering the nature of the program. Courts are not free to rewrite eligibility requirements but must analyze whether a plaintiff is "otherwise qualified" against the requirements set by the covered entity.

See *Davis*, 442 U.S. at 413-14 (rejecting a challenge to a nursing program because the requested modifications would have fundamentally altered the purposes and eligibility requirements of the program set by the college). Courts must ask whether reasonable modifications or accommodations may be made that do not fundamentally alter the program, *see Choate,* 469 U.S. at 300, or whether the requirement is not an "essential eligibility requirement" to qualify for the benefits or program, 28 C.F.R. § 41.32(b).

The dissent also argues that only extending the benefits at issue to Olympic athletes "has a discriminatory effect" against Paralympic athletes. However, disparate impact, by itself, does not state a prima facie case under § 504. *Choate,* 469 U.S. at 299. Further, our holding clearly does not permit denying benefits on the basis of gender, as the dissent suggests, because such a classification would be facially discriminatory. Here, the classification is facially neutral and is not "directed at an effect or manifestation of a handicap" as required for proxy discrimination. *McWright,* 982 F.2d at 228.

We sympathize with Plaintiffs' efforts to obtain benefits similar to those received by their Olympic counterparts. However, we cannot modify the Rehabilitation Act to reach a result in their favor absent statutory or regulatory authority to import, wholesale, Title IX regulations and precedent into § 504. *See Choate,* 469 U.S. at 293 n. 7. Plaintiffs should

seek a remedy with the legislative or executive branches, not the courts.

AFFIRMED.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. Section 504 of the Rehabilitation Act provides that a qualified individual with a disability may not, solely because of his disability, be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a). What the statute forbids is exactly what has occurred and is occurring here. This defiance of plain legislative intent is crystal-clear from the congressional statement that the Paralympics are "the Olympics for disabled amateur athletes." S. Rep. No. 105-325 at 2, 1998 WL 604018 (1998).

The issues presented.

A prima facie case under section 504 requires proof (1) that the plaintiff has a disability; (2) that plaintiff is otherwise qualified to participate in the program; (3) that the program receives federal money; and (4) that the program discriminated against the plaintiff. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1151 (10th Cir. 1999). In these appeals it is not contested that Plaintiffs have disabilities and that the USOC receives federal money.

Therefore, the questions before us are whether the Plaintiffs are "otherwise qualified" to participate in the program and whether the USOC discriminated against the Plaintiffs.

The plaintiffs are qualified to participate in the program.

Quite obviously, this court cannot answer the first question without determining what "the program" is in this case. Indeed, resolution of these appeals turns on whether the USOC is operating one "program" or separate programs, one for the disabled and one for the able-bodied. The clear answer to that question has been provided by Congress. Section 504 defines "program or activity" to include "all of the operations of" the covered entity. 29 U.S.C. § 794(b).[1] Plaintiffs are qualified to participate in the program; they are recognized as elite paralympic athletes whose competition in the Paralympic Games is, Congress has mandated, to be promoted by the USOC.

Thus, this case can and should be resolved by simple application of the plain language of the statute, and this court should reverse the judgment of the district court. The majority reaches the wrong result

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[1] The district court expressed substantial doubt about whether the USOC is a "covered entity." That question is not before this court, however, as the USOC has not argued that the judgment should be affirmed on the alternative ground that it is not subject to the Act.

because its analysis goes off the track at the outset by failing to follow the statutory definition of "program." As noted by the majority, Congress specifically amended the Rehabilitation Act and other statutes to broaden the definition of "program or activity." Maj. op. at 8, n.2. But the majority inexplicably ignores the definition, insisting that the definition is of no moment because it is undisputed in this appeal that the Act "applies to all of the USOC's *programs*. . . ." *Id.* (emphasis added).[2]

This use of the plural reveals the circular nature of the majority's analysis. The underlying issue (easily resolved by the plain language of the statute) is whether, in examining the USOC's challenged activities, we should consider the USOC as operating a single program or several separate ones. The majority incorrectly *assumes* – there is certainly no explanation for the approach – that we are dealing with separate programs. And it is only by ignoring the statutory definition and making this assumption of dealing with separate programs that the majority is able to assert that the unequal treatment afforded to the Plaintiffs is permissible.

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[2] Indeed, the majority even accuses Plaintiffs of trying to "alter" section 504's definition of "program or activity" by discussing the reasoning of *Klinger v. Dept. of Corrections*, 107 F.3d 609 (8th Cir. 1997). I fail to see how Plaintiffs are trying to "alter" the definition. Plaintiffs *rely* on the legislative definition of "program," while the majority ignores it.

Not only does the majority ignore the statutory definition of "program," but its assumption that separate programs are involved exonerates the USOC for doing just what the Supreme Court instructs must *not* be done – defining the benefit "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled. . . ." *Alexander v. Choate,* 469 U.S. 287, 301 (1985).

The USOC's program discriminates against the plaintiffs.

Plaintiffs are subject to discrimination by being denied access to benefits that are provided to Olympic and Pan American Games athletes who are not disabled. The USOC's practice of providing health insurance and other benefits to Olympic and Pan American Games athletes, but not Paralympic athletes, clearly has a discriminatory effect. Section 504 prohibits not only intentional discrimination but, I am satisfied, also the use of criteria or methods of administration such as those involved here that have the *effect* of subjecting people with disabilities to discrimination. 28 C.F.R. § 41.51(b)(3)(1). *See also Alexander v. Choate,* 469 U.S. at 299.[3]

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[3] In *Choate,* the Court assumed without deciding that section 504 reaches conduct that has a disparate impact on the disabled, after having noted compelling reasons to conclude that Congress intended such an interpretation and that all the circuits that have reached the issue had reached that conclusion.

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Denying benefits to Plaintiffs because they are athletes training for the Paralympic Games, and not the Olympic or Pan American Games, is a proxy for discriminating against them because of their disabilities. The majority's assertion that "there is no fit between being an Olympic athlete and not being disabled," maj. op. at 11, demonstrates the faulty aim of its analysis. Presumably the majority would not countenance the denial of equal benefits based on gende Yet, if such blatant discrimination existed, even then it could be said that there was "no fit" between being an Olympic athlete and being male. The USOC has shown four examples in one hundred years of disabled athletes who have competed in the Olympics or Pan American Games. The exceptions prove the rule: The policy of awarding benefits to athletes training for the Olympics or the Pan American Games while excluding those training for the Paralympic Games discriminates against the disabled. The reason that courts inquire about the "fit" between a practice and a class of protected individuals is because the fact that a practice does not discriminate against *every* member of a protected class is not sufficient to show that members of the protected class have the meaningful access to which they are entitled. *See Lovell v. Chandler,* 303 F.3d 1039, 1054 (9th Cir. 2002).

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469 U.S. at 295-97 & n. 17. In the instant appeal, the defendants do not contend otherwise.

For these reasons I am compelled to respectfully but emphatically dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **99-cv-2077-JLK**

MARK E. SHEPHERD,

Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE, a corporation,

Defendant.

Civil Action No. **03-cv-1364-JLK**

**SCOT HOLL[O]NBECK
JOSE ANTONIO IN[I]GUEZ
JACOB WALTER JUNG HO HEILVEIL, and VIE SPORTS MARKETING, INC., a Georgia corporation,**

Plaintiffs,

v.

UNITED STATES OLYMPIC COMMITTEE, a federally chartered corporation, and U.S. PARALYMPICS, INC., f/k/a UNITED STATES PARALYMPIC CORPORATION, a Colorado nonprofit corporation,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' DISPOSITIVE MOTIONS RE ATHLETE CLAIMS

KANE, J.

I. INTRODUCTION

These disability discrimination actions brought by elite Paralympic wheelchair athletes push the margins of federal disability discrimination laws as applied to the United States Olympic Committee (USOC) and Congress' enactment of our system of international amateur athletic competition. Civil Action No. 99-cv-2077-JLK, brought by wheelchair basketball Paralympian Mark Shepherd, challenges the USOC's purported failure to provide him with the services, benefits and financial and other support routinely provided to his Olympic counterparts. Civil Action 03-cv-1364 asserts similar claims on behalf of elite wheelchair racers Scott Hollonbeck, Jose Antonio Iniguez and Jacob Walter Jun Ho Heilveil, as well as claims related to the USOC's marketing of U.S. Paralympic trademarks as they relate to Hollonbeck's marketing company Vie Sports.

According to the Plaintiff wheelchair athletes, the USOC was established by Congress to oversee matters pertaining to the selection, training and participation of elite disabled and non-disabled amateur athletes in international Olympic, Paralympic, and Pan-American competition. Charged with obtaining the best amateur representation possible in both Olympic and Paralympic events, Plaintiffs claim it is discriminatory for the USOC to provide them programming, privileges, and financial support inferior to that provided non-disabled athletes under the Olympic program. Plaintiffs claim the USOC also discriminates against elite Paralympic athletes by

promoting, marketing and selling (or limiting U.S. Paralympic's ability to promote, market and sell) rights to the Paralympic trademark at a level below the level it promotes, markets and sells rights to the Olympic mark, which has the effect of limiting the funds available for Paralympic programs and limiting the public's awareness of the Paralympics and individual Paralympic athletes. Finally, Plaintiffs claim the statutory governance structure of the USOC discriminates against Paralympic athletes by denying them representation. It is these "Athlete Claims," brought under § 504 of the Rehabilitation Act and Title III of the Americans with Disabilities Act, and the parties' cross-motions regarding their viability under the federal anti-disability discrimination laws, that are before me now for consideration.[1]

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[1] In addition to the "athlete" claims asserted on behalf of disabled athletes generally in both cases under the Americans with Disabilities Act, there are individual common law claims for damages asserted by Plaintiff Shepherd in 99-2077 and by Plaintiff Vie Sports Marketing in 03-1364. Shepherd, who was employed by the USOC for a period of time during which he also trained as a Paralympic athlete, seeks damages from the USOC based on the USOC's refusal to allow him to train during work hours which Shepherd claims violated the express written and oral terms of his employment contract. Vie Sports, a sports marketing company formed by Plaintiff Holl[o]nbeck in 2000 to market the Paralympic brand and trademark, asserts separate breach of contract and promissory estoppel claims against the USOC in 99-2077 based on the USOC's alleged failure to support or to allow Vie Sports to sell the rights to the Paralympic mark in the open market. These claims were addressed during oral

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Given the important and novel issues raised, I set the motions for oral argument. Argument has been completed, and my rulings follow.

A. Statutory Framework.

The ASA.

Congress originally chartered the United States Olympic Association in 1950 to organize and promote the United States' participation in international Olympic competition. The USOA became the USOC in 1964. In 1978, concerned with "'the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States,'" Congress enacted the Ted Stevens Olympic and Amateur Sports Act ("ASA"), P.L. 95-606 (codified at 36 U.S.C. § 371 *et seq.* (1978)). *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee,* 483 U.S. 522, 543-544 (1987) (quoting from H.R. Rep. 95-1627 at p. 8) ("1978 House Report"). The ASA charged the USOC with responsibility for coordinating amateur athletics for the Olympic and Pan-American Games and for resolving disputes involving national governing bodies of individual sports. *See* 1978 House Report at 8, 1978 WL 8517 (Leg. Hist.). The duties of developing interest and participation in amateur athletics, as well as determining who may sponsor amateur athletic competition in the United States and what

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argument in September 2005 and will proceed separately from any "athlete" claims that survive summary judgment.

athletes will be sanctioned to compete on behalf of the United States in particular competitions, were left under the ASA to individual amateur sports organizations selected by the USOC as the "national governing bodies" in each sport on the Olympic or Pan-American program. 36 U.S.C. §§ 391 (selection and requirements for selection as "national governing body"), 392 (duties of national governing bodies).

With respect to the disabled, the original ASA identified as one of the 14 enumerated purposes of the USOC "to encourage and provide assistance to amateur athletic programs and competition for handicapped individuals, including where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals." 36 U.S.C. § 374(13).[2] National governing bodies were

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[2] Specifically, the 1978 ASA stated the "objects and purposes" of the USOC as follows:

(1) establish national goals for amateur athletic activities and encourage the attainment of those goals;

(2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations;

(3) exercise *exclusive jurisdiction, either directly or through its constituent members or committees, over all matters pertaining to the participation of the United States in the Olympic Games and in the Pan-American Games, including the representation of the United States in such games, and over the organization*

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of the Olympic Games and the Pan-American Games when held in the United States;

(4) obtain for the United States, either directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan-American Games;

(5) promote and support amateur athletic activities involving the United States and foreign nations;

(6) promote and encourage physical fitness and public participation in amateur athletic activities;

(7) assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes;

(8) provide for the swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition;

(9) foster the development of amateur athletic facilities for use by amateur athletes and assist in making existing amateur athletic facilities available for use by amateur athletes;

(10) provide and coordinate technical information on physical training, equipment design, coaching, and performance analysis;

(11) encourage and support research, development, and dissemination of information in the areas of sports medicine and sports safety;

(12) encourage and provide assistance to amateur athletic activities for women;

(13) *encourage and provide assistance to amateur athletic programs and competition for handicapped individuals, including, where feasible, the expansion of opportunities for meaningful participation by*

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delegated the specific duty to "encourage and support amateur athletic sports programs for handicapped individuals and the participation of handicapped individuals in amateur athletic activity, including where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals." 36 U.S.C. § 392(7). The ASA made no mention of the Paralympic movement or Paralympic Games, and articulated its mission in terms of fostering and developing amateur international competition at the Olympic and Pan-American Games only. *See id.*, § 374, *supra* n. 2.

In 1998, the ASA was amended to reflect "significant changes" in Olympic and amateur sports at the time, specifically including the "significant" growth "in size and prestige" of the Paralympics. *See* S. Rep. 105-325 at p. 2, 1998 WL 604018 ("1998 Senate Report"). The 1998 version of the ASA, now codified at 36 U.S.C. § 220501 *et seq.*, amended the statement of the USOC's purposes objectives at § 374(3) and (4) to add participation in the "Paralympic Games"

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handicapped individuals in programs of athletic competition for able-bodied individuals; and

(14) encourage and provide assistance to amateur athletes of racial and ethnic minorities for the purpose of eliciting the participation of such minorities in amateur athletic activities in which they are underrepresented.

36 U.S.C.A. § 374 (1990) (emphasis added).

(recodified at 36 U.S.C. § 220503(3), (4))[3] and amended § 391 to recognize "paralympic sports organizations" as national governing bodies for sports for which no national governing body had been designated. *Id.* § 220522(b). *See* 1998 Senate Rep. at 17.[4]

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[3] For example, as amended § 22503(3) and (4) charge the USOC

> (3) to exercise exclusive jurisdiction, directly or through constituent members of committees, over –
>
> > (A) all matters pertaining to United States participation in the Olympic Games, the *Paralympic Games,* and the Pan-America Games, including representation of the United States in the games; and
> >
> > (B) the organization of the Olympic Games, the *Paralympic Games,* and the Pan-American Games when held in the United States;
>
> (4) to obtain for the United States, directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each event of the Olympic Games, the *Paralympic Games,* and Pan-American Games. . . .

36 U.S.C. § 22503(3), (4) (emphasis added.) In addition, § 374(13) was changed to replace the term "handicapped individuals" with the more appropriate "disabled amateur athletes." *Id.* § 22503(13) (object and purpose of USOC includes "to encourage and provide assistance to amateur athletic programs and competition for *amateur athletes with disabilities,* including, where feasible, the expansion of opportunities for meaningful participation by such *amateur athletes* in programs of athletic competition for able-bodied *amateur athletes.*").

36 U.S.C. § 220503(13) (changes in italics).

[4] For example, the National Wheelchair Basketball Association (NWBA) serves as the national governing body for men's,

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My overall impression in analyzing this legislative history is that the ASA distinguishes between authority and power the USOC has to oversee the United States' participation in international amateur athletic competition and the authority it has nationally to regulate and govern amateur sports nationally to obtain the best representation in the Olympic/Pan-American and Paralympic Games. Vis á vis the *international* community, the USOC "represent[s] the United States as its national Olympic committee in relations with the International Olympic Committee and the Pan-American Sports Organization and as [the United States'] national Paralympic committee in relations with the International Paralympic Committee," "coordinate[s] and develop[s] amateur athletic activity in the United States directly related to international amateur athletic competition," and "organize[s], finance[s], and control[s] the representation of the United States in the competitions and events of the Olympic, Paralympic and Pan-American Games." 36 U.S.C. §§ 220505(c)(2), (3). Vis á vis individual citizens, however, and while charged generally to "encourage and provide assistance to amateur athletic activities for women" (§ 220503(12)), "minorities" (§ 220503(14)), and "amateur athletes with disabilities" (§ 220503(13)), the USOC effects this purpose under the ASA first by *selecting and recognizing* "national governing bod[ies]" (or, where

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women's and youth wheelchair basketball in the United States. *See* http://www.nwba.org, "Mission Statement."

necessary because a sport exists only for the disabled, "paralympic sports organizations") for each amateur sport in the Olympic, Pan-American or Paralympic Games (§ 220521 & 22) and *then delegating to them* the duties of "develop[ing] interest and participation throughout the United States" in that sport (§ 220524(1)), "allow[ing] an amateur athlete to compete in any [sanctioned] international amateur athletic competition conducted by any amateur sports organization" (§ 220524(5)), and "encourag[ing] and support[ing] amateur athletic sports programs for individuals with disabilities and the participation of individuals with disabilities in amateur athletic activity." § 220524(7). Thus, while Plaintiffs are not incorrect in claiming the USOC is charged with "obtaining" the best amateur representation both for the Olympic *and* Paralympic Games, they cannot ignore that it does so through "the appropriate national governing bod[ies]" to which the responsibility for supporting athletic opportunities and participation for all athletes, including the disabled, is delegated. *See* 36 U.S.C. §§ 22503(4) ("through the appropriate national governing body"), 22523-24 (authority and duties of national governing bodies include developing interest and participation in amateur sports they represent and to encourage and support amateur sports programs for individuals with disabilities).

Moreover, it is only those individual governing bodies that have any express duties under the ASA to provide equal or nondiscriminatory participation

opportunities within their particular Olympic or Paralympic sport, and even then, only on the non-disability-based factors of race, color, age, religion, sex, or national origin. 36 U.S.C. § 220522(a)(8).[5] The omission of disability as a prohibited discriminatory factor under 36 U.S.C. § 220522(a)(8) is significant. It is precisely because athletes are classified within their sports (or provided disability-specific sports) on the basis of their disabilities that the need for protection on the basis of that disability becomes problematic. Under the ASA, for example, the NWBA may not discriminate on the basis of race, sex or national origin. A prohibition against disability discrimination is omitted, ostensibly because the limits of federal antidiscrimination law are reached simply by the accommodation. No proscription against disability discrimination binds the NWBA because the NWBA's charges are all disabled by definition.

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[5] An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it

* * *

> (8) provides an equal opportunity to amateur athletes . . . to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin . . .

36 U.S.C. § 220522(a). The equal opportunity provisions do not preclude discrimination on the basis of disability, ostensibly because disabled amateur athletes participate on the very basis of their disability.

The question, then, becomes whether some other statute or regulatory scheme operates to prohibit the USOC – as the umbrella organization charged with coordinating national governing organizations such as the NWBA and producing, through them, the best American representation at the Olympic, Pan-American and Paralympic Games – from allocating reduced or inferior benefits to athletes training for Paralympic, as opposed to Olympic or Paralympic competition. According to Plaintiffs, the ADA and Rehabilitation Act do so.

ADA/Rehabilitation Act.

The Rehabilitation Act of 1973 and ADA comprise a comprehensive federal mandate to remedy and eliminate discrimination against disabled individuals. Section 504 of the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The ADA, enacted in 1990, expanded liability for disability discrimination. Title I of the ADA, codified at 42 U.S.C. § 12112, prohibits covered employers from discriminating against individuals on the basis of disability in the workplace regardless of their status as recipients of federal funding; Title II (§ 12132) prohibits public entities from discriminating against individuals or excluding them from participation in,

or the benefits of, their services or programs on the basis of disability; and Title III (§ 12182) provides injunctive relief against private entities who discriminate against the disabled in the operation of "places of public accommodation." *See PGA Tour, Inc. v. Martin,* 532 U.S. 661, 674-75 (2001). It is Title III that provides the basis for Plaintiffs' claims in this case.

Title III provides "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). A "place of public accommodation" for purposes of Title III is a facility generally open to the public at large, including restaurants, hotels, libraries, stores, theaters, stadiums, zoos, and the like. *Id.* § 12181(7). General prohibitions under Title III include denying, on the basis of disability, opportunities to participate in or benefit from the goods, services, privileges or accommodations of the private entity (§ 12182(b)(1)(A)(i)); affording disabled individuals the opportunity to participate in or benefit from such goods or services in a manner "not equal to that afforded to other individuals" (§ (b)(1)(A)(ii)); or providing disabled individuals with a good, service, facility, privilege, or accommodation "separate from" that afforded other individuals unless necessary to provide the individual a benefit "as effective" as that provided to others.

(§ (b)(1)(A)(iii)). It is also unlawful under Title III to impose or apply eligibility criteria for use of a public accommodation that screen out or tend to screen out the disabled from fully and equally enjoying any goods, services, facilities, privileges, or advantages of that public accommodation (42 U.S.C. § 12182(b)(2)(A)(i)); to fail to modify policies or to take steps necessary to afford the disabled goods, services, facilities, etc. of the accommodation (§ (b)(2)(A)(ii) & (iii)); and failure to remove architectural and communication barriers to ensure that no person with a disability is excluded or denied goods, services, facilities, etc. (§ (b)(2)(A)(iv), (v)).

In their Amended Complaint, Plaintiffs assert three different theories of discrimination under Title III: (1) discrimination in the denial of participation in Olympic Programming in violation of § 12182(b)(1)(A)(i); (2) discrimination in the provision of an unequal participation opportunity in violation of § 12182(b)(1)(A)(ii); and (3) discrimination through the use an eligibility criterion for Olympic Programming that screens out the disabled from full and equal enjoyment of the public accommodation in violation of § 12182(b)(2)(A)(i). Am. Compl. ¶¶ 2, 48-59.[6] Plaintiffs specifically do *not* assert a claim based

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[6] The theories of discrimination set forth in Title III of the ADA also constitute discrimination under the Rehabilitation Act. *Compare* 28 C.F.R. § §§ 41.51(b)(1)(i)-(vii) (2006) ("General prohibitions against discrimination") *with* § 84.13 (Rehabilitation Act regulation from which 42 U.S.C. § 12182(b)(2)(A)(i) was

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on the provision of a separate benefit under § 12182(b)(1)(A)(iii).

Plaintiffs' Title III claim, then, rests on a set of carefully crafted assumptions. First, based on the USOC's "control" over administration, housing, training, and competition in the United States, together with its operation of Olympic Training Centers in Colorado Springs (Colorado), Chula Vista (California) and Lake Placid (New York), Plaintiffs claim the USOC "operates places of public accommodation" such that it is a covered entity under Title III. Am. Compl., 03-cv-1364, ¶¶ 24, 26-33. Plaintiffs then characterize programming benefits offered athletes by the USOC and Paralympic Committee as "goods, services, facilities, privileges, advantages, or accommodations" of those "places of public accommodation," and contend the U.S. Olympic and Paralympic Committees discriminate against them by denying them, on the basis of their disabilities, the "full and equal enjoyment" of those programming benefits.[7] *Id.*

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derived). *See* H.R. Rep. No. 101-485, pt. 2, at 105 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 388.

[7] For example, Plaintiffs claim they are relegated to lowest priority in terms of using Olympic training facilities, receive few or reduced financial incentives, and are ineligible for tuition grants, the Resident Athlete Program, or insurance. The USOC, according to Plaintiffs, does not even supply Paralympians with uniforms. The result, Plaintiffs contend, is that, they must pay significant training expenses out of their own pockets, impairing their ability to train for Paralympic competition. *See* Am. Compl., 03-cv-1364 at ¶¶ 48-60. Other complaints are less tangible, including Plaintiff Hollonbeck's allegations that he was

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¶¶ 144-146. That each of these characterizations is strained is something I address in the next section.

For their relief, Plaintiffs seek an injunction requiring Defendants to cease their discrimination and provide them "full and equal enjoyment of their goods, services, facilities, privileges, advantages, and/or accommodations in a fashion to be specified following trial." Am. Compl., 03-cv-1364 at p. 24 "Prayer for Relief."[8] Plaintiffs equivocate as to the specifics of any injunction ultimately issued, acknowledging "equal" allocations would not necessarily be appropriate or required under the ADA, and urging the adoption of an "equitable" or "proportionate" remedial standard along the lines of that available under Title IX and its implementing

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discriminated against during exhibition events in the 1992, 1996 and 2000 Olympic Games by being denied benefits such as marching in the opening ceremonies or receiving prize money for winning medals. *Id.* ¶¶ 61-67. Since Hollonbeck's participation in the 2000 Olympics, Paralympians now receive financial awards for gold, silver and bronze medals, but Plaintiffs contend the practice remains discriminatory because awards are at 1/10th the amount of Olympic medal awards. *Id.* ¶¶ 51-53.

[8] Plaintiffs also seek a "declaration" that Defendants' discriminatory practices violate the ADA and Rehabilitation Act. Declaratory relief is redundant and therefore unavailable under these circumstances, where it seeks nothing more than a legal determination already before the court on Plaintiffs' civil rights claims. *See Saum v. Widnall,* 912 F. Supp. 1384, 1394 (D. Colo. 1996) (Kane, J.) ("declaration" of constitutional violation would be gratuitous reiteration when constitutionality of defendant's actions already before the court) (citing cases).

regulations.[9] Plaintiffs support their reliance on Title IX with a citation to *Grove City College v. Bell,* 465 U.S. 555, 566 (1984), and in particular in the Supreme Court's look to the Rehabilitation Act as an interpretive guide for Title IX, on grounds both find their source in the antidiscrimination provisions of Title VI of the Civil Rights Act of 1964. While I appreciate the analogy and agree Title IX's regulatory remedial scheme works well with Plaintiffs' theory of relief in this case, I cannot agree federal courts are authorized to cobble together congressional enactments in this manner. As I will explain more fully below, Plaintiffs' request that I graft a remedial scheme promulgated under a statute banning sex discrimination onto statutes prohibiting disability discrimination, and then infuse both into the statute establishing the federally chartered corporation that oversees the country's amateur athletic system and has exclusive jurisdiction over matters pertaining to international Olympic, Paralympic and Pan-American

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[9] As acknowledged by Plaintiffs' counsel at oral argument, the precise nature of Plaintiffs' claim for relief is difficult to articulate. *See* Rep. Tr. (10/4/05) at p. 16, 42, 59 (acknowledging "exact" or equal funding or benefits is not required under the ADA, and suggesting adoption of "equitable" or "proportionate" remedial standard along the lines of that which Plaintiffs claim is available under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, and its implementing regulations, which prohibit sex discrimination in the allocation of benefits between men's and women's athletic programs and suggest evolving standards for determining compliance.)

competition, simply falls outside the scope of federal judicial authority.

Defendants deny Plaintiffs have stated a viable claim for disability discrimination. The crux of the issues raised are set forth in the parties' cross-motions for summary judgment in *Shepherd* (Doc. Nos. 139 and 140) and in the USOC's 12(b)(6) Motion to Dismiss in *Hollonbeck* (Doc 3). The USOC denies the ADA or Rehabilitation Act confer a cause of action for disparate treatment or discrimination in the allocation of resources between Olympic/Pan-American athletes and Paralympians, maintaining these are separate programs across which differences in allocation are not discriminatory for purposes of federal civil rights legislation because they are not comparable.

B. The Problem of "Fit."

My ultimate and reluctant conclusion is that the USOC is correct and Plaintiffs have no actionable right under the ADA or Rehabilitation Act to enjoin the USOC's actions in allocating lesser privileges and benefits to Paralympic athletes than Olympic athletes. The overarching issue is *duty,* namely, whether the USOC has a duty to provide Paralympians with opportunities, support and benefits similar, proportionate, or equal to those provided Olympians. The language of the ASA imposes no such duty.[10] The

[10] *See supra,* n. 5 and accompanying text.

question is whether, directly or by reference to other civil rights laws (such as Title IX, the ADA and Rehabilitation Act) give rise to one.

Subject matter jurisdiction is uncontested and under a liberal reading of the parties' pleadings I find it exists under 28 U.S.C. § 1343 and 1367. While I proceed to analyze Plaintiffs' claims under the ADA and Rehabilitation Acts, I pause to express my overarching concern that, absent an extension of existing law by Congress or a relevant regulatory agency, neither the wrong of which Plaintiffs complain nor the relief they seek "fit" within the rubric of the ADA or Rehabilitation Act.

My initial concern is with the assertion that U.S. Olympic Training Centers are "places of public accommodation" within the contemplation of 42 U.S.C. § 12181(7) and that financial support, insurance, being able to walk in opening ceremonies, receiving prize money, or serving on governing bodies are "goods, services, facilities, privileges, [or] advantages" attendant the operation of those "places" for purposes of the ADA. Olympic Training Centers are venues to which only the most select athletes in the nation have access. They are not recreation centers, stadia or arenas held out for use by the non-disabled public at large. The question of the ADA's applicability, in my view, is a serious threshold question that the parties largely avoid.

The phrase "public accommodation" is defined for purposes of Title III in terms of 12 extensive

categories of facilities leased or operated by private entities "if the operations of such entities affect commerce." The facilities covered are:

> (A) an inn, hotel, motel, or other place of lodging . . . ;
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> (B) a restaurant, bar, or other establishment serving food or drink;
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> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;

> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, *or other place of exercise or recreation.*

42 U.S.C. § 12181(7) (emphasis added), *applied in Bauer v. Muscular Dystrophy Ass'n, Inc.*, 268 F. Supp.2d 1281, 1289-1290 (D. Kan. 2003), *aff'd* 427 F.3d 1326 (10th Cir. 2005). Plaintiffs contend the USOC's training facilities fall within the category of "gymnasium, health spa . . . or other place of exercise or recreation" and therefore constitute a "place of public accommodation" under subsection (L). While the categories listed at § 12181(7) are to be "construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the non-disabled," *Bauer* at 1290 (citing *Martin,* 532 U.S. at 666-67), there is something fundamentally different about the establishments and "places of exercise and recreation" open to the non-disabled public generally – which appear to be what the category at § 12181(7)(L) describe – and the United States' four Olympic Training Centers.

Unlike the public and private golf courses operated or "leased" by the PGA in *Martin* – to which all paying customers have access regardless of ability –

the training facilities operated by the USOC are accessible only to those *already* selected by the national governing bodies to the Olympic, Pan-American or Paralympic teams in their individual sports and identified as elite, world-class athletes. *C.f. Martin,* 532 U.S. at 677-78 (among the "privileges" offered members of the general public who pay to play on PGA operated golf courses is the privilege of vying to qualify for and play in the PGA Tour); *Akiyama v. United States Judo Inc.,* 181 F. Supp.2d 1179, 1183 (W.D. Wa. 2002) (applying *Martin* and holding that the Civil Rights Act's prohibition against discrimination on basis of religion applied to amateur judo competition where members of general public were welcome to test their skills and talents in preliminary tournaments designed to identify the best competitors). Absent any allegation that the privileges and benefits afforded athletes at the U.S. Olympic Training Centers are available to members of the general public vying for a berth on the U.S. Olympic or Paralympic team, it is difficult to say that *Martin* applies. Does the ADA mandate "full and equal enjoyment" of world-class training facilities to which only the fewest among us have access, disabled or non-disabled? At best, the Supreme Court in *Martin* left unaddressed the question raised in the instant case, namely, whether "places of public accommodation" to which the non-disabled do *not* have general access fall within the purview of Title III.

Moreover, the benefits Plaintiffs seek relate less to the USOC's physical facilities than to the teams

they put forth for international competition. This, too, stretches the "fit" between the discrimination alleged and the jurisdictional basis of Plaintiffs claims under the ADA. In *Elitt v. U.S.A. Hockey,* 922 F. Supp. 217, 223 (E.D. Mo. 1996), for example, the district court determined it lacked jurisdiction over a cognitively disabled child's Title III claim against U.S. amateur hockey organization because plaintiff was challenging the "denial of participation in the youth hockey league instead of denial of access to a place of accommodation, i.e. the ice rink." *Id.* (youth hockey league is not a "place of public accommodation" for purposes of Subchapter III of the ADA). Only because Plaintiffs in the instant case challenge the denial of their full and equal enjoyment of the USOC's physical facilities (in their relegation to third priority for their use) do they survive scrutiny under this threshold jurisdictional requirement.

The problem of "fit" is further underscored by a look at the selective comparisons on which Plaintiffs rely. Plaintiffs allege discrimination in their treatment as disabled individuals by the USOC as Paralympians compared to the USOC's treatment of "non-disabled" Olympic (and Pan-American) athletes. The distinction is muddled by the fact that disabled athletes are not *per se* disqualified from participation in the Olympics or Pan-American Games.[11] Because

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[11] The Paralympics provide participation opportunities for elite athletes belonging to six different disability groups: amputee, cerebral palsy, visual impairment, spinal cord injuries,

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"disabled" individuals can and have participated in the Olympics and Pan-American Games, the comparison categories on which Plaintiffs rely are not necessarily the "disabled" and non-disabled as those distinctions are drawn under the ADA, but Olympic and Paralympic athletes.

Finally, I question the viability of Plaintiffs' theory of disability-based "discrimination" as conflating Olympic benefits offered or not offered to Paralympians with the benefits of access or equal enjoyment of public accommodations by the disabled. Because this conflation is ultimately what dooms Plaintiffs' claims under an ADA analysis, the question is largely academic in this prefatory context. Wheelchair athletes are obviously treated differently (i.e. "discriminated" against) on the basis of their disability in their relegation to the Paralympic wheelchair basketball event as opposed to the Olympic basketball event. This difference in treatment or access, however, which is obviously based on and defined solely by the player's disability, is not the "discrimination" Plaintiffs seek to call out. Rather, Plaintiffs challenge the lesser or inferior quality of the benefits

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intellectual disability and a group which includes all those that do not fit into the aforementioned groups (*les autres*). Athletes whose disabilities do not impact their ability to participate in events recognized by the International Olympic Committee (i.e., deaf swimmer Terence Parkin, who won a silver medal in the 2000 Olympics in Sydney) are not required to participate in the Paralympics and are ostensibly not part of Plaintiffs' theory of disability discrimination.

allocated the Paralympic wheelchair basketball athletes by the USOC, claiming the different allocation is based on eligibility criteria (membership on the Olympic team) that screens out or tends to screen out disabled elite athletes. Again, there is an amalgam of standards forming the basis for Plaintiffs' claim. Plaintiffs, for example, take pains to distinguish theirs from a claim that the USOC provides them with an ineffective "separate benefits" under § 12182(b)(1)(A)(iii) because that analysis forces them into a separate-program paradigm that constrains their theory discrimination. Yet the remedy Plaintiffs seek is precisely that they be given benefits and privileges "as effective" or "equivalent to" those provided Olympians. Is a lack of parity or inequality between Paralympic and Olympic programming actionable except as between "separate" programs? Given the significantly smaller population (the disabled) from which Paralympians are drawn, the Paralympic Games are smaller in scale with fewer participants than the Olympics and Pan-American Games. Policies directing a lesser allocation of resources between the Olympians and Paralympians may simply reflect that fact wholly independently of any disability-based discrimination.[12] Plaintiffs

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[12] As Defendants argue, the fewer number of participants and internationally fielded teams in the Paralympic Games results in American Paralympians, for example, having significantly greater chances of medaling at the Paralympic Games than American athletes competing in the Olympics. Parity in medal awards, then, would result in U.S. Paralympic athletes

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concede this point, but again invoke Title IX and its implementing regulations to urge an application of the ADA that would compel the USOC's to comply with its mandated purpose to develop and increase amateur athletic opportunities for disabled athletes, not merely to reflect the status quo.

Plaintiffs' goals, noble and inspiring, extend beyond the reach of the courts to find and enforce under the ADA or the Rehabilitation Act. The Title IX analogy is apt only to the extent it suggests new legislation or the amendment of the USOC's federal charter pursuant to which a regulatory scheme for the equitable remediation of discriminatory allocations between disabled and non-disabled representatives on the United States' elite international athletic teams. Title IX does not infuse the ADA with a remedial scheme that then infuses the ASA with a cause of action for the "discrimination" alleged in this case. Title III of the ADA entitles disabled individuals with the right to seek to enjoin private entities from providing unequal or ineffective opportunities to enjoy or participate in accommodations made available to the public generally. The USOC's Paralympic program, with its attendant differences in perks and privileges

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receiving far more than their Olympic counterparts. Of course, these fact-based scenarios are germane only to the extent they capture the complexity of the "discrimination" question and illustrate grounds for my unease on the issue of "fit." They are not germane, and I do not consider them, as part of my analysis of Plaintiffs' claims under a Rule 12(b)(6) standard.

compared to the USOC's Olympic program, exists to provide disabled individuals with participation opportunities fundamentally premised on and defined by the disabilities Plaintiffs argue cannot lawfully form the basis for separate treatment. There is an unavoidable non sequitur to the assertion.

In short, I am troubled that Plaintiffs' theory of relief fundamentally overreaches, looking to the courts and federal antidiscrimination law to remedy inequities in the *quality* of the accommodation afforded certain disabled elite athletes to compete internationally in amateur athletics -- accommodations that are defined exclusively by those athletes' inability to compete without accommodation – that are not enjoyed by the non-disabled public at large and which exist solely as a reflection of political will (or lack thereof) within the USOC and/or the legislative and executive branches of government directing its charter.

Do I decry a culture that relegates Paralympians to second class status in the quantity and quality of benefits and support they receive from the USOC? Emphatically yes. I conclude, however, that the ADA and Rehabilitation Act are aimed at the baser stuff of discrimination, such as the denial generally of a disabled person's right to participate fully and equally in public life, including places offering sports and recreation to the general public. The ADA and Rehabilitation Act simply do not apply to the wrongs alleged by Plaintiffs.

In my view, the inequities and injustices Plaintiffs describe are ultimately for the legislative or executive,[13] and not judicial, branches of government to acknowledge and rectify. It appears, however, that for purposes of the instant Motions Defendants agree the ADA and Rehabilitation Act apply to the USOC and the U.S. Paralympic Committee and reach their programming benefits and decisions. For purposes of appeal and in order fully to develop the record, I proceed to address Defendants' Motions directed to the merits of Plaintiffs' claims.

II. MERITS.

In its effort to train and obtain the best United States athletes for the Olympic Games, the USOC offers Olympic athletes benefits and incentives. This Olympic "programming" includes providing $25,000, $10,000, and $2,500, respectively, for each gold, silver, and bronze medal an athlete wins at the Olympic

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[13] The legislative branch might amend the ASA or a relevant agency might promulgate regulations under the ASA to implement directives against discrimination or the fostering of athletic opportunities for disabled amateur athletes or risk losing federal funding. *C.f.* 34 C.F.R. § 106.41 (regulatory provisions implementing proscription against sex discrimination in education programs receiving federal funding stated in Title IX and requiring the proportionate allocation of athletic opportunities and moneys for college women or lose federal funding). *See Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 827-28 (10th Cir. 1993) (applying Title IX and its implementing regulations to order state university to reinstate terminated Division I women's softball program).

Games. (Am. Compl., 03-cv-1364, ¶ 52.). Olympic programming also includes, but is not limited to, providing Olympic athletes first priority in using USOC training facilities (¶ 54) and making Basic Grants, Tuition Assistance Grants, and Elite Athlete Health Insurance available to Olympic athletes. *Id.* ¶¶ 55-57.

Olympic programming is not offered to Paralympic athletes. Rather, Paralympic athletes receive third priority in using USOC training facilities, *id.* at ¶ 54, and the Paralympic medal-incentive is ten percent of that provided to Olympic athletes. *Id.* ¶ 53 ($2,500, $1,500, and $1,000, respectively, for each gold, silver, or bronze medal). Moreover, the USOC does not make Basic Grants, Tuition Assistance Grants, or Elite Athlete Health Insurance available to Paralympic athletes. *Id.* at ¶¶ 55-57, 59. Plaintiffs assert the USOC's original and amended Constitutions discriminate against Paralympic athletes, first by denying them participation on the Athlete Advisory Committee all together, and now by limiting their representation to two members. *Id.* ¶ 68-69.

Plaintiffs Scott[ ] Hollonbeck, Jose Antonio Iniguez, Jacob Walter Jung Ho Heilveil (collectively Athlete Plaintiffs), are all current or former Paralympic athletes. (Am. Compl. ¶¶ 35, 39, 42-43, 45-47.) They assert the USOC's system of distributing benefits discriminates against them on the basis of their disabilities. *Id.* at ¶ 48. As a result of being denied Olympic programming, Athlete Plaintiffs assert they have incurred significant personal expense that

diminishes their ability to train and their opportunity to compete on behalf of the United States as Paralympians. *See id.* at ¶ 60. In addition, Plaintiff Holl[o]nbeck states he was discriminated against during the 1992, 1996 and 2000 Olympic Games by being denied certain intangible benefits of participation, including medal compensation and marching in the opening ceremonies. *Id.* ¶¶ 61-67. As set forth above, Defendants move to dismiss.

A. Preemption.

Defendants contend Plaintiffs' ADA and Rehabilitation Act claims are "actually challenges to the method and reasoning by which the USOC decides to allocate its limited resources to numerous different athlete classes under its jurisdiction" and therefore within the USOC's exclusive jurisdiction 36 U.S.C. § 220503(3). *See* Defs.' Mot. Dismiss, 03-cv-1364, at 6. In support of this argument, Defendants cite several cases in which courts have held no private right of action exists under the ASA to challenge matters left exclusively to the USOC or the national governing bodies of individual amateur sports. *Id.* at 5 (citing *Martinez v. USOC,* 802 F.2d 1275 (10th Cir. 1986) (holding Congress did not intend for USOC to be liable in tort for wrongful death of boxer injured during events not fully controlled by USOC); *Oldfield v. Athletic Congress,* 779 F.2d 505 (9th Cir. 1985) (no private cause of action to challenge governing body's determination regarding loss of amateur status); *Michels v. USOC,* 741 F.2d 155 (7th Cir. 1984) (weight

lifter had no cause of action under ASA to challenge suspension for positive drug test); *DeFrantz v. USOC,* 492 F. Supp. 1181 (D.D.C. 1980) (1978 ASA changed USOC's charter but did not alter USOC's exclusive authority to decide not to send an American team to 1980 Olympics), *aff'd,*701 F.2d 221 (D.C. Cir. 1980); *Walton-Floyd v. USOC,* 965 S.W.2d 35 (Tex. Ct. App. 1998) (no private cause of action under ASA in tort for breaching duty of care in connection with drug testing hotline); *Dolan v. U.S. Equestrian Team, Inc.,* 608 A.2d 434 (N.J. Super. Ct. App. Div. 1992) (USOC has exclusive jurisdiction over athlete eligibility determinations and no private cause of action is recognized under ASA to challenge nonselection for U.S. equestrian team)).

Athlete Plaintiffs agree with Defendants that the ASA bars private rights of action brought under the Act (Pls.' Opp'n at 18), but reject any characterization of their claims as "pertaining" exclusively to the United States' participation in the Olympic, Paralympic and Pan-American Games. Plaintiffs contend the duty to allocate benefits to Paralympians in a nondiscriminatory manner arises not from the ASA, but from the ADA and Rehabilitation Act, and requires them to effect their corporate mandate in a way that does not discriminate on the basis of disability. *Id.* at 23.

Plaintiffs support their argument with several cases in which courts have permitted plaintiffs to proceed with a variety of claims in spite of the defendants being governed by the ASA. *Id.* at 20-21 (citing

Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580 (7th Cir. 2001)) (RICO and conspiracy allegations brought by athlete against USOC in blood doping case not preempted, but failed under 12(b)(6) standard to state claim); *Akiyama,* 181 F. Supp .2d at 1183 (holding Title II of Civil Rights Act of 1964 applied to prevent discrimination on basis of religion at judo competition); *Sternberg v. U.S.A. Nat'l Karate-Do Fed'n, Inc.,* 123 F. Supp. 2d 659 (E.D.N.Y. 2000) (female athlete stated valid Title IX claim against karate national governing body based on organization's decision to withdraw women's karate team from international competition).[14]

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[14] I note that in addition to allowing plaintiff athlete's Title IX claim to proceed, the district court in *Sternberg* did, indeed, recognize an implied private right of action under the ASA to seek damages against a the karate national governing body for sex discrimination. *Sternberg,* 123 F. Supp. 2d at 664-666 (applying four factors identified in *Cort v. Ash,* 422 U.S. 66 (1975) and principles articulated in *Cannon v. University of Chicago,* 441 U.S. 677 (1979) and *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) to conclude Congress's statements in ASA prohibiting sex discrimination and requiring governing bodies to provide "support and encouragement" for participation by women permit "[a] narrow right of action regarding sex discrimination by national governing sports bodies [to] be implied."). Plaintiffs do not rely on this aspect of *Sternberg,* conceding that in the Tenth Circuit, at least, no private right of action exists to enforce the terms of the ASA. *See Martinez,* 802 F.2d at 1281 (enactment of 1978 ASA included removing athlete's "bill of rights," evincing Congress's consideration and rejection of a cause of action for athletes to enforce ASA's provisions).

To this list we may add *Lee v. United States Taekwondo Union,* 331 F. Supp. 2d 1252 (D. Haw. 2004), in which the district court rejected the USOC's contention that the ASA preempted federal civil rights laws and allowed former U.S. Olympic coach to bring a race discrimination claim against the USOC and the national governing body for the sport of taekwondo under 42 U.S.C. § 1981. The district court applied the reasoning in *Oldfield, Slaney* and *Michels* to distinguish between private claims challenging eligibility or similar matters "pertaining to participation" regarding which the USOC and its national governing bodies have exclusive jurisdiction under 36 U.S.C. § 220503(3) and claims that invoke rights independently of this grant of jurisdiction. Thus, to the extent plaintiff Lee was seeking a declaration of eligibility and subsequent reinstatement as coach of the U.S. Olympic Taekwondo Team through his state tort and contract claims, the court concluded such claims were preempted. *Lee,* 331 F. Supp. 2d at 1257. To the extent Lee was invoking protections afforded him under federal civil rights laws independently of and in addition rights governed exclusively by the ASA, however, his claims were not preempted. *Id.* at 1260-61 ("when two federal statutes may be reconciled, the court must give effect to both"), (*citing Watt v. Alaska,* 451 U.S. 259, 267 (1981)). As long as the remedy sought does not require it to enter the realm of the USOC's exclusive jurisdiction, "the [ASA] does not nullify or supersede other federal laws that provide private rights of action to ensure freedom from discrimination." *Id.* at 1260 (because

discrimination on the basis of race in violation of § 1981 did not pertain to the United States' participation in the Olympic Games, Lee could proceed with his § 1981 claim).

The instant case presents an exceedingly close call under *Lee* and related authorities because the matters of which Plaintiffs complain – priority usage of training facilities, training grants and insurance benefits, the USOC's Constitutional governance structure, medal incentives and decisions as to who walks or does not walk in Olympic opening ceremonies – indeed sound like "matters pertaining to" the United States' participation in the Olympic or Paralympic Games within the exclusive jurisdiction of the USOC under 36 U.S.C. § 220503(3). Given the predominate mandates of the ADA to call out and remedy disability-based discrimination, as well as the inexactness of the injunctive relief sought,[15] I cannot categorically state that Plaintiffs' Athlete Claims fall within the exclusive realm of "matters pertaining to the participation of the United States in the . . . Paralympic Games."

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[15] As previously noted, Plaintiffs request for relief in this case is in the nature of injunctive relief to be determined at trial, the goal of which is to provide Plaintiffs with benefits and incentives which, while not necessarily *equal* to those given Olympians, will ensure Paralympians their full and equal enjoyment of the Olympic experience.

I proceed, then, to analyze Plaintiffs' allegations of discrimination under the ADA and Rehabilitation Act under a 12(b)(6) standard.

B. Standard of Review

The purpose of a Fed. R. Civ. P. 12(b)(6) motion to dismiss is to test the sufficiency of a complaint. *U.S. Olympic Comm. v. Am. Media, Inc.,* 156 F. Supp. 2d. 1200, 1204 (D. Colo. 2001). A complaint must put the defendant on notice of the plaintiff's claim and the general facts upon which it is based. *Brunetti v. Rubin,* 999 F. Supp. 1408, 1409-10 (D. Colo. 1998) (incorporating Fed. R. Civ. P. 8(a)). A plaintiff need not precisely state the elements of each claim, but he must provide direct or inferential allegations that would support recovery under some legal theory. *Id.* There is a strong presumption against granting a motion to dismiss for failure to state a claim, *Maez v. Mtn. States Tel. & Tel., Inc.,* 54 F.3d 1488, 1496 (10th Cir. 1995) (referring to the Federal Rules of Civil Procedure), and unless it is clear "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," such motions must be denied. *American Media,* 156 F. Supp. 2d. at 1204 (internal citations and quotations omitted). Accordingly, well-pleaded allegations in the complaint must be treated as true, and any reasonable inferences arising from them must be construed in the plaintiff's favor. *Id.*

C. Conclusions of Law.

I have already expressed my doubts regarding the viability of Plaintiffs' ADA claim based on the disconnection between the goods and services being denied and Plaintiffs rights to them as "public accommodations," as well as my concerns that at least some of Plaintiffs' complaints fall outside the scope of federal antidiscrimination laws because they pertain to matters over which the USOC has exclusive jurisdiction. Nevertheless, and in order to develop the record fully, I proceed to analyze Plaintiffs' Rehabilitation Act and ADA claims on their merits.

The ADA and Rehabilitation Act are interrelated Congressional mandates designed to remedy discrimination against disabled individuals. *See McGeshick v. Principi,* 357 F.3d 1146, 1149 (10th Cir. 2004). The Rehabilitation Act provides the baseline level of protection from disability discrimination when the ADA must be construed. *See id.* at § 12201(a) ("Except as otherwise provided . . . nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973. . . .").

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C.A. § 794(a)

(2006).[16] The prima facie elements of claim under section 504 of the Rehabilitation Act are straightforward, requiring a plaintiff to show (1) he is disabled; (2) he is otherwise qualified for participation in the program; (3) the program discriminates against the plaintiff; and (4) the program receives federal financial assistance. *McGeshick,* 357 F.3d at 1150 (citing cases).

On the other hand, the prima facie elements of an ADA claim depend on a number of factors, including the alleged theory of discrimination, *see, e.g., Fortyune v. Am. Multi-Cinema, Inc.,* 364 F.3d 1075, 1082 (9th Cir. 2004) (prima facie elements in Title III failure to accommodate case); *Hubbard v. Twin Oaks Health and Rehab. Ctr.,* 408 F. Supp. 2d 923, 929 (E.D. Cal. 2004) (prima facie elements in Title III failure to remove barrier case); *In re Baby K,* 832 F. Supp. 1022, 1028-29 (E.D. Va. 1993) (prima facie elements in Title III denial of participation case), and the factual circumstances of the case. *See, e.g., Mershon v. St. Louis Univ.,* 442 F.3d 1069, 1076 (8th Cir. 2006) (plaintiff must show he was qualified academically where failure to accommodate alleged in post-secondary education context); *cf. Rakity v. Dillon Companies, Inc.,* 302 F.3d 1152, 1164 (10th Cir. 2002) (applying *McDonnell Douglas* burden

[16] To the extent Section 504 was modified between the issuance of this Order and the time *Shepherd* was filed, those modifications are immaterial. *Compare* 29 U.S.C.A. § 794(a) (2002) *with* 29 U.S.C.A. § 794(a) (1998).

shifting framework in Title I case "as modified to relate to differing factual situations"). As previously set forth, Plaintiffs in the instant case assert three different theories of discrimination under §§ 12182(b)(1)(A)(i) (denial of participation), (ii) (unequal participation opportunity) and (b)(2)(A)(i) (discriminatory eligibility criteria tending to screen them from full and equal enjoyment). Accordingly, to state a prima facie case of discrimination under the ADA and Rehabilitation Act, Plaintiffs must demonstrate (1) they are disabled; (2) Defendants operate places of public accommodation; (3) Plaintiffs are qualified for participation in the program or program benefits of the public accommodation; and (4) the USOC discriminated against Plaintiffs by denying them the opportunity to participate in the program, by providing them a participation opportunity unequal to that afforded non-disabled individuals, and/or by using eligibility criteria for program benefits that screens out or tends to screen out the disabled from fully enjoying the program.

I have already determined the USOC does not operate a "place of public accommodation" or, if it does, that the discrimination alleged by Plaintiffs relates not to their rights of access to *that* accommodation or, with the exception of priority access to gymnasia or other physical training facilities of the U.S. Olympic Training Centers, to the benefits thereof, but to their right to participate in and receive full and equal enjoyment of membership on a USOC-sponsored *team*. Looking beyond those "problems of

fit," however, the question arises as to whether, in a Title III case premised on allegations of disparate treatment between categories of disabled and non-disabled individuals in the benefits of an athletic program, a Title III plaintiff must, like his counterparts proceeding under the Rehabilitation Act and Titles I and II of the ADA,[17] demonstrate that he is both disabled *and* "otherwise qualified" to receive the benefits that form the basis of his claim of discrimination. Under the circumstances of this case, I agree with Defendants that he does.

The ADA addresses three broad categories of discrimination: disparate treatment, disparate impact, and a failure to provide a reasonable accommodation. *E.g. Davidson v. America Online, Inc.*, 337 F.3d 1179, 1188-89 (10th Cir. 2003) (making the assertion in a Title I employment case). Plaintiffs' allegations in this case are of classic disparate treatment, *i.e.*, that they, as Paralympians, receive reduced benefits and fewer privileges than their non-disabled counterparts purely on the basis of their disability. It is clear that in disparate treatment

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[17] *Compare* 29 U.S.C. § 794(a) (Rehabilitation Act, prohibiting discrimination against any "qualified individual with a disability" on the basis of that disability), 42 U.S.C.A. § 12112(a) (Title I, prohibiting employment discrimination against a "qualified individual with a disability") *and* § 12132 (Title II, public entities shall not discriminate against a "qualified individual with a disability") *with* § 12182(a) (private entities may not discriminate against any "individual . . . on the basis of disability," where the term "qualified" does not appear).

cases, an individual must be otherwise qualified to receive the benefit he asserts it is discriminatory to deny him.

The logical explanation for the omission of an "otherwise qualified" requirement under Title III is that, "in most circumstances, no qualifications are required to enjoy a public accommodation as secured by Title III." *Mershon,* 442 F.3d at 1976. Where, by contrast, the nature of a "public" accommodation is such that it provides programs only to qualified members of the general public, a disabled individual must show he is also qualified as an element of his prima facie case. *See Martin,* 532 U.S. at 680 (significant in Title III case that, "[i]n consideration of the entry fee, any golfer with the requisite letters of recommendation acquires the opportunity to qualify for and compete in petitioner's tours"). *See also Bowers,* 118 F. Supp. 2d at 517, n. 18 ("[w]hile words 'otherwise qualified' or 'qualified individual' do not appear in the language of Title III, Title II analysis can be applicable to Title III claims."); *cf. Bercovitch v. Baldwin Sch., Inc.,* 133 F.3d 141, 154 (1st Cir. 1998) (finding little significance in lack of "qualified" language in Title III). This requirement is consistent with the law construing the Rehabilitation Act, and I conclude Plaintiffs must prove they were *qualified* individuals with a disability whose disparate treatment can only be explained as discrimination on the basis of disability.

A plaintiff is "otherwise qualified" under the Rehab Act if he "is able to meet all of a program's

requirements in spite of his [disability]." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). To satisfy the prima facie qualification element under both the ADA and Rehab Act, Athlete Plaintiffs must show that with or without reasonable modification to USOC rules, policies, or practices, they meet the essential eligibility requirements for Olympic benefits.

Appropriate Comparison Group – Unified or Separate Program.

Plaintiffs contend the necessary eligibility requirement for Olympic benefits is not membership on the U.S. Olympic team, but membership on any of the three teams under the USOC's purview under its federally mandated charter (i.e., the U.S. Olympic, Pan-American or Paralympic Teams). In other words, because the USOC oversees a single, comprehensive program for that group of elite, world-class athletes who participate as representatives of the United States in the Olympic, Paralympic or Pan-American Games, Plaintiffs contend the USOC cannot discriminate in its allocation of benefits to that group on the basis of disability alone.

As previously set forth, Plaintiffs' characterization of the USOC as a single selection and training organization charged with allocating programming and benefits in a nondiscriminatory manner across all Olympic, Paralympic and Pan-American athletes is belied by the organizational structure established

by the ASA, the USOC's federal charter and the legislative history evincing Congress's intent in enacting both. It suggests – inaccurately – that Congress's 1998 amendments to the ASA did more than formalize recognition of the existing Paralympic movement and add the Paralympics to the list of international competitions to which the United States will send representatives. It also ignores the separate nature of the participation opportunity that forms the historical essence of the Paralympic experience, and glosses over the distinction between equality of *access,* in terms of participation opportunity, and the quality of that access once provided. Here, the participation opportunity for wheelchair athletes is clearly provided through a separate (Paralympic) program.

The cases Plaintiffs cite to urge a comparison with the USOC's "unified" Olympic/Paralympic/Pan-American "program" do not compel a contrary conclusion because they turn on a denial of *access* to the unified "program," which is not at issue in this case.[18]

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[18] Both *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach,* 846 F. Supp. 986 (S.D. Fla. 1994) and *Rodde v. Bonta,* 357 F.3d 988 (9th Cir. 2004) involved the elimination of programs or facilities for the disabled. In *Dreher Park,* the district court held the elimination of specialized recreational programs for disabled children had the effect of denying disabled individuals the benefits of the city's overall recreational program in violation of Title II. The court rejected the city's argument that the elimination could not be deemed discriminatory because many of its non-specialized programs were accessible by the disabled, because the elimination had the

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Dreher Park, for example, involved the elimination, entirely, of all specialized recreational programs for the disabled and the district court's ruling that plaintiffs did not have to establish eligibility to participate in a specific recreational program to challenge that elimination. The court used wheelchair soccer as an example, concluding wheelchair-bound youth did not have to establish they were otherwise able "run" or "kick" to challenge the program's elimination, because the relevant program benefits they were seeking were not simply participation on a soccer team, but the benefits of the City's overall recreational/athletic program.

> As a paradigmatic scenario, it may be the case that there are wheelchair-bound children who cannot meet the 'essential requirements' for a soccer team because they cannot run or cannot kick a ball. However, such an analysis would be persuasive only if the full and entire extent of the City's

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effect of denying disabled individuals programming "needed to give equal benefits of recreation to persons with disabilities." 846 F. Supp. at 991-92. Similarly in *Rodde*, the Ninth Circuit held the shutting down of defendant's only hospitals designed to serve disabled individuals violated Title II because the services designed for the general population, while available to the disabled, "would not adequately serve the unique needs of the disabled who therefore would be effectively denied services that the non-disabled continued to receive." 357 F.3d at 998. The "benefits" denied plaintiffs in these cases were the benefits of *access* to meaningful programming, not the *quality* of access afforded (and access, I might add, not challenged as ineffective or unmeaningful).

> recreational program was one soccer team. An "essential eligibility requirement" of a *soccer team* may be the ability to run and kick, but the only "essential eligibility requirement" of the City's *recreational program* (which is the sum of a variety of individual recreational, social, and educational activities and programs) is the request for the benefits of such a program. (Citations omitted.) Therefore, the only 'essential eligibility requirement' that Plaintiffs must meet is to request the benefits of a recreational program.

Dreher Park, 846 F. Supp. at 990 (emphasis original). Here, the USOC has not eliminated its Paralympic Team (and doing so would violate its federal charter) and the benefits Plaintiffs seek are not of access to the Olympic experience or participation in elite athletics, but of the quality of their experience as Paralympians compared to the experience of non-disabled Olympians. *Dreher Park* does not get Plaintiffs there. By refusing to couch their claims in terms of a comparison of separate benefits under 42 U.S.C. § 12182(b)(1)(A)(iii), there is simply no basis in the ASA, ADA or relevant case law to avoid the eligibility requirement of Olympic Team membership to claim discrimination in the denial of Olympic Team benefits.[19]

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[19] In this regard I agree with Defendants that *Does 1-5 v. Chandler,* 83 F.3d 1150, 1155 (9th Cir. 1996) provides the better analogy. In *Chandler,* the Ninth Circuit ruled the legislature's

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Next, Plaintiffs argue the criterion used to determine eligibility for Olympic programming (i.e., being selected to the Olympic, as opposed to Paralympic, Team) is invalid because it is facially discriminatory. Resp. at pp. 6-9 (arguing USOC eligibility criteria is invalid because it is a proxy for facial discrimination and is analogous to the inequities Title IX was designed to remedy). I find the argument somewhat facile and the analogy to Title IX inapt. Where factors such as disability or sex render individuals unable to participate without a separate program or participation opportunity, the question becomes one of the effectiveness or equality of the separate benefit and not that the creation of the separate participation opportunity itself is tantamount

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welfare amendments to provide eligible needy individuals with dependent children benefits for unlimited duration while providing needy disabled individuals benefits for only one year did not violate Title II because disabled individuals' ineligibility for the longer term benefits did not turn on their disabled status. In so holding, the Ninth Circuit rejected appellees' reliance on *Dreher Park* to argue the proper characterization of the "program" for eligibility purposes was the overall purpose of benefitting the needy. According to the Court, the fact that the non-disabled needy without dependent children were not entitled to funds under the program suggested the proper view was of two discrete forms of benefit providing for two discrete subgroups of the needy population. As in *Chandler*, the better view of the USOC's purpose in fostering participation and competition in the Olympic/Pan-American and Paralympic Games is oversight over two discrete forms of benefits providing for two discrete subgroups of elite, world-class amateur athletes.

to unlawful discrimination.[20] Title III is grounded in this distinction, defining discrimination as the imposition of eligibility criteria that tend to screen out the disabled "unless . . . necessary for the provision of the goods, services, facilities . . . or accommodations being offered"; the failure to modify policies "unless . . . the entity can demonstrate that making modifications would fundamentally alter the nature of such goods, service . . . "; or failing to take steps to ensure the disabled are not segregated "unless . . . taking such steps would fundamentally alter the nature of the good, service . . . ". *See* 42 U.S.C. § 12182(b)(2)(i)-(iii). *See* H.R. Rep. No. 101-485, pt. 1, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 481 (providing illustrative examples such as a rule that prohibits the deaf or blind from entering a store or requiring customers to present a driver's license in order to purchase merchandise, because that would screen out persons with disabilities who do not drive). Because Plaintiffs do not challenge Paralympic programming under a separate benefit analysis, their claims hinge on the assertion that no valid basis other than invidious discrimination justifies the "eligibility criteria" of being an Olympian to receive Olympic benefits.

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[20] *See Fitzgerald v. Corrections Corp. of America,* 403 F.3d 1134 (10th Cir. 2005) (in prisoner case, disabled prisoner would not have been "otherwise qualified" to receive medical treatment in absence of his alleged disability because his alleged disability was reason why he was seeking medical treatment in the first instance). *Accord Chandler, supra,* n. 16.

The Necessary "Qualification" of being an Olympian does not Constitute Discrimination under 42 U.S.C. § 1282(b)(2)(A).

The method for challenging a qualification as discriminatory in violation of the ADA and Rehab Act is to show that it either screens out or tends to screen out disabled individuals and is unnecessary or nonessential. *See* 42 U.S.C.A. § 12182(b)(2)(A)(i); 45 C.F.R. § 84.13 (analogous Rehabilitation Act regulation for challenging criteria that screen out or tend to screen out disabled individuals); *see also Pottgen v. Missouri State High Sch. Activities Ass'n,* 40 F.3d 926, 930 (8th Cir. 1994) (using "necessary" and "essential" interchangeably in qualification analysis). Assuming the USOC's eligibility criteria of being an Olympic athlete screens out disabled individuals, the USOC urges it is essential to furthering its purpose of training and obtaining the best Olympic athletes to represent the United States. (Mot. Dismiss at 15.) Plaintiffs respond first by contending a determination of whether the USOC's eligibility criteria is necessary is inappropriate at this stage because they have not indicated the existence of an affirmative defense in the Amended Complaint. (Resp., p. 14.) Alternatively, Athlete Plaintiffs argue the eligibility criteria is unnecessary because the USOC mandate of training and obtaining the best athletes applies equally to Olympians and Paralympians, and therefore "limiting benefits to Olympic athletes is not necessary for the provision of the benefits being offered." *Id.* Both arguments fail.

First, where "the applicability of [an affirmative] defense [is] clearly indicated and . . . appear[s] on the face of the pleading," a complaint is subject to dismissal on that basis. 5B C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, pp. 708-10 (3d ed. 2004). Here, it is apparent from the allegations in the Complaint that Athlete Plaintiffs are challenging the eligibility criterion used to deny them Olympic programming 42 U.S.C. § 12192(b)(A)(i), which invites the affirmative defense also stated in that statute that such a criterion is permissible if it is shown to be "necessary" for the provision of the accommodations being offered generally. *Id.* Accordingly, I turn to whether the facts as pleaded render the eligibility criterion of being an Olympic Team member "necessary" to the provision of Olympic programming, generally.

In assessing the necessity of the USOC's eligibility criteria for Olympic programming, the "goods, services, facilities, privileges, advantages, or accommodations" that Athlete Plaintiffs were allegedly wrongly denied must be identified. *See* 42 U.S.C. § 12182(b)(2)(A)(i). Plaintiffs assert the goods, services, facilities, and privileges at issue are the financial and other intangible benefits and training priority given Olympic, as opposed to Paralympic, athletes. (Pls.' Resp. at 15.) Plaintiffs plead no facts tending to demonstrate these benefits are not "necessary" to the maintenance of the Olympic team, and simply rests on the assertion that the eligibility criterion of selection to the Olympic, as opposed to the

Paralympic, team in order to receive Olympic benefits is invalid.

It is here that the concern over the characterization of the Olympic Training Centers as "public accommodations" merges with the necessary elements of a claim under the Rehabilitation Act and ADA. Assuming, for the sake of argument, that the ADA requires the USOC to provide anything as a "public accommodation," it is the opportunity to represent one's country in a recognized amateur sport in one of three categories of sanctioned (Olympic/Pan-American or Paralympic) competition. *See Martin,* 532 U.S. at 680 (the PGA provides an opportunity for any golfer, disabled and non-disabled alike, to vie for the opportunity to qualify for the PGA Tour); *Henrietta D. v. Bloomberg,* 331 F.3d 261, 274 (2d Cir.2003) (the ADA and Rehabilitation Act viewed as "helping individuals with disabilities access public benefits *to which both they and those without disabilities are legally entitled*") (emphasis added). And unlike the golfer in *Martin* who could compete on the PGA Tour with accommodation, Plaintiff Paralympians cannot and do not purport to be able to compete in the Olympics with or without accommodation. Instead, they compete through the separate participation opportunity of representing the United States as Paralympians. Once afforded access to the benefits of the so-called "public accommodation" afforded by Congress through the ASA, the right to the nondiscriminatory provision of *Olympic* benefits stops.

Simply put, it is irrelevant that the USOC chooses to provide Olympic programming only to Olympic athletes as long as the gateway to that program operates in a nondiscriminatory manner. However unfair the fact that the participation opportunity afforded Plaintiffs as Paralympians does not include full Olympic benefits, Plaintiffs are afforded a participation opportunity defined by their disability, the benefits of which are lesser based not an additional layer of discrimination but by operation of eligibility criteria beyond the reach of the ADA and Rehabilitation Act.

In short, Paralympic athletes' expectations for the equitable allocation of benefits between Paralympians and Olympians competing on behalf of the United States under the auspices of the USOC is not a matter which courts, through the ADA, may mandate or enforce. While much to be desired, such a mandate must derive from the legislative branch or appropriate agency of the Executive. As urged by Plaintiffs' counsel at oral argument, Title IX and its implementing regulations may indeed form an apt analogy – not as infusing the ADA with additional remedies to then be grafted onto the ASA – but as a paradigm for appropriate congressional and agency action.

Based on the foregoing, I conclude that Plaintiffs' Athlete Claims, which challenge the USOC's inequitable allocation of resources and benefits to them as Paralympians compared to those afforded Olympians generally, fail to state a claim upon which relief under

the ADA or Rehabilitation Act may be granted. I therefore **GRANT** Defendants' Motion to Dismiss in *Hollonbeck,* 03-cv-1364, which in turn disposes of the identical issue presented as a Motion for Summary Judgment in *Shepherd,* 99-cv-2077.

These cases will be set for a status conference within ten days of the date of this Memorandum Opinion and Order to formulate a pretrial plan for Plaintiffs' remaining claims. In anticipation of this conference, the parties are to submit a brief status report setting forth their respective positions regarding the continued viability of Plaintiffs' Vie Sports Marketing-related claims in the wake of my decision.

Dated November 16, 2006.

s/ John L. Kane
SENIOR U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SCOT HOLLONBECK, et. al., Plaintiffs-Appellants, v. UNITED STATES OLYMPIC COMMITTEE, a federally-chartered corporation; et. al. Defendants-Appellees, - - - - - - - - - - - - - - - - - - - DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; Amici Curiae.	No. 07-1053

ORDER

(Filed Feb. 25, 2008)

Appellants' petition for panel rehearing is denied. Judge Holloway would grant panel rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. Judge Holloway called for a poll on the en banc suggestion and the vote was 6-6. Consequently, the suggestion fails. *See* Fed. R. App. P. 35(a). The en banc request is accordingly denied. Judges

Henry, Briscoe, Lucero, Murphy, Hartz and O'Brien voted to grant rehearing en banc.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

Federal Statutes Prohibiting Discrimination "Under" A "Program or Activity" Receiving Federal Financial Assistance

15 U.S.C. § 775 (discrimination on the basis of sex)

15 U.S.C. § 3151(a) (discrimination on the basis of sex, age, race, color, religion, national origin or handicap)

20 U.S.C. § 1681(a) (discrimination on the basis of sex) (Title IX)

23 U.S.C. § 324 (discrimination on the basis of sex)

29 U.S.C. § 794(a) (discrimination on the basis of disability) (Rehabilitation Act)

29 U.S.C. § 2938(a)(2) (discrimination on the basis of age, race, color, religion, sex, national origin, disability, or political affiliation or belief)

40 U.S.C. § 122(a) (discrimination on the basis of sex)

40 U.S.C. § 14702 (discrimination on the basis of sex)

42 U.S.C. § 290cc-33(a)(2) (discrimination on the basis of sex or religion)

42 U.S.C. § 300w-7(a)(2) (discrimination on the basis of sex or religion)

42 U.S.C. § 300x-57(a)(2) (discrimination on the basis of sex, pregnancy, or religion)

42 U.S.C. § 708(a)(2) (discrimination on the basis of sex or religion)

42 U.S.C. § 2000d (discrimination on the basis of race, color, or national origin) (Title VI)

42 U.S.C. § 3123 (discrimination on the basis of sex)

42 U.S.C. § 3789d(c)(1) (discrimination on the basis of race, color, religion, national origin, or sex)

42 U.S.C. § 5309(a) (discrimination on the basis of race, color, national origin, religion, or sex)

42 U.S.C. § 5891 (discrimination on the basis of sex)

42 U.S.C. § 6102 (discrimination on the basis of age)

42 U.S.C. § 6727(a)(1) (discrimination on the basis of race, color, national origin, or sex)

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42 U.S.C. § 9821(b) (discrimination on the basis of sex)

42 U.S.C. § 9849(b) (discrimination on the basis of sex)

42 U.S.C. § 9918(c)(1) (discrimination on the basis of race, color, national origin, or sex)

42 U.S.C. § 10406(a)(2) (discrimination on the basis of sex or religion)

42 U.S.C. § 12832 (discrimination on the basis of race, color national origin, religion, or sex)

43 U.S.C. § 1747(10) (discrimination on the basis of race, color, religion, national origin, or sex)

49 U.S.C. § 306(b) (discrimination on the basis of race, color, national origin, or sex)

49 U.S.C. § 5332(b) (discrimination on the basis of race, color, creed, national origin, sex, or age)

104

Supreme Court, U.S.
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No. 07-1504

IN THE
Supreme Court of the United States

SCOT HOLLONBECK, *et al.*,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit correctly held that the United States Olympic Committee does not violate the Rehabilitation Act by funding different programs differently, so long as access to each individual program remains facially neutral and non-discriminatory.

RULE 29.6 STATEMENT

Respondent the United States Olympic Committee (USOC) states that it is a nonprofit corporation chartered by Congress under the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 *et seq.* The USOC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTERSTATEMENT	3
REASONS FOR DENYING THE WRIT	12
I. THE DECISION BELOW WAS A CORRECT APPLICATION OF SETTLED LEGAL STANDARDS TO THE UNIQUE FACTS OF THIS CASE	12
II. THE DECISION BELOW CONFLICTS WITH NONE OF THIS COURT'S DECISIONS OR WITH ANY DECISION FROM THE COURTS OF APPEALS	19
III. THIS CASE IS A POOR VEHICLE FOR REVISITING SETTLED ANTI-DISCRIMINATION PRECEDENTS	30
CONCLUSION	34

TABLE OF AUTHORITIES

Page

Cases:

Alexander v. *Choate*, 469 U.S. 287 (1985)..... *passim*

Alexander v. *Sandoval*, 532 U.S. 275 (2001)..... 15, 16, 27

Bragdon v. *Abbott*, 524 U.S. 624 (1998)..... 8

Brown v. *Board of Education*, 347 U.S. 483 (1954)..... 29

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Castellano v. *City of New York*, 142 F.3d 58 (2d Cir. 1998) ..... *passim*

Chaffin v. *Kansas State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003)..... 20

Does 1-5 v. *Chandler*, 83 F.3d 1150 (9th Cir. 1996)..... 2, 16, 17, 27

Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992)..... 15, 16, 27

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TABLE OF AUTHORITIES—Continued

Page

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Southeastern Community College v. *Davis*, 442 U.S. 397 (1979) 22

Spector v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) 21

Traynor v. *Turnage*, 485 U.S. 535 (1988) 12

United States v. *Fordice*, 505 U.S. 717 (1992) 28, 29, 30

Statutes:

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36 U.S.C. § 220511(a)(4) 33

42 U.S.C. § 12182(a) 21

42 U.S.C. §§ 12131-12165 20

Civil Rights Restoration Act of 1987, Pub L. No. 100-259, 102 Stat. 28 15

Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681(a) ..... *passim*

Legislative Materials:

H.R. Rep. No. 101-485, pt. 2 (1990) 20

S. Rep. No. 105-325 (1998) 33

TABLE OF AUTHORITIES—Continued

Page

Rule:

S. Ct. Rule 10 26

Regulations:

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Page

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BRIEF IN OPPOSITION

INTRODUCTION

As the courts below recognized, this case involves claims that "push the margins of federal disability discrimination laws." Pet. App. 22a; *see id.* 14a-15a.[1] Based on a novel reading of the Rehabilitation Act's "program or activity" definition, petitioners suggest that entities receiving federal funds must not only provide equal access to all of their individual programs—the established rule the Tenth Circuit below applied—but must also ensure equality "in the

[1] For purposes of recusal, counsel for the USOC states that Hogan & Hartson LLP began representing the USOC in this matter in March 2003.

allocation of a benefit *between* two or more programs." Pet. 17 (emphasis in original). Under this rule, the United States Olympic Committee (USOC), which operates different programs designed to support different elite athletes who compete in different sports in different international athletic competitions, would nevertheless need to ensure that the benefits in all programs were " 'equitable' or in some sense 'proportionate' " or " 'allocate[ed] fairly.' " Pet. 9 & n.5 (brackets in original).

The Tenth Circuit faithfully applied this Court's precedents in rejecting that boundless interpretation of the Rehabilitation Act. More than 20 years ago, this Court unanimously held that "[t]he Act does not * * * guarantee the handicapped equal results." *Alexander* v. *Choate*, 469 U.S. 287, 302 (1985). In the years since *Choate* was decided, few courts have ever had occasion to consider the extraordinary rule urged in the petition. Those that have, have squarely rejected the proposition that the federal disability-discrimination statutes "require equivalent benefits in different programs." *Does 1-5* v. *Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996); *accord Castellano* v. *City of New York*, 142 F.3d 58, 70 (2d Cir.), *cert. denied*, 525 U.S. 820 (1998).

None of the factors traditionally warranting plenary review is therefore present. There is no circuit split because the two decisions the petition points to both considered different statutes (the Americans with Disabilities Act in one case and Title IX in the other), and neither addressed the novel question presented by the petition. Nor is there a conflict with this Court's decisions because the two cases identified in the petition either expressly

confirm that there is no equality-across-all-programs rule, *Choate*, 469 U.S. at 302, or else were decided before Congress had added the "program or activity" definition on which the petition is based. *See Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984).

This case is also a poor vehicle for revisiting settled antidiscrimination-law precedents. The Tenth Circuit below never had occasion to consider the remedy that would be required were petitioners' rule adopted. Nor has any other court in the country. Thus, it would fall to this Court in the first instance to explain how institutions covered by the Rehabilitation Act (to say nothing of Title VI, Title IX, and the Age Discrimination Act) should determine if the benefits they provide to different programs are " 'equitable' or in some sense 'proportionate' " or " 'fairly allocated.' " Pet. 9 & n.5 There is, in short, no reason for this Court to grant plenary review. The petition should be denied.

COUNTERSTATEMENT

1. One of the USOC's many obligations under its congressional charter is to "obtain for the United States * * * the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games and Pan American Games." Ted Stevens Olympic and Amateur Sports Act (ASA), 36 U.S.C. § 220503(3). Needless to say, the USOC, like any entity, does not have an infinite pool of resources to draw upon to carry out this important mission. It must allocate its scarce resources to programs that will best promote the overall standing of the United States in these international competitions.

To honor Congress's mandate to attract "the most competent amateur representation" at each of the Games, the USOC has developed a number of different initiatives. As with any institution—be it a university, government, or private business—the USOC draws upon its expertise, needs, and budget when fashioning its specific programs. Those factors inevitably dictate the size and scope of each program; there is no one-size-fits-all approach.

2. The USOC follows this commonsense analysis when developing programs to promote the United States Olympic Team and the United States Paralympic Team. For example, one of the factors that the USOC considers in tailoring programs designed to attract "the most competent amateur representation" for these different teams is past success. U.S. Paralympic athletes have traditionally won *substantially* more medals than Olympic athletes. For example, only 7% of U.S. athletes received a medal at the 1998 Olympic Winter Games, while a full 68% of U.S. Paralympic athletes earned a medal at that year's Paralympic Winter Games. C.A. J.A. 241.[2] Four years later in Salt Lake City, just 16% of U.S. Olympic athletes won a medal at the Olympic Winter Games, compared to the 75% of U.S. Paralympic athletes who came home with a medal from the Paralympic Winter Games. *Id.*; *see also* Pet. App. 4a ("U.S. Paralympians have been very successful compared to their Olympic counterparts * * * .").

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[2] C.A. J.A. refers to the Joint Appendix filed below in the Tenth Circuit.

Based on these and a variety of other factors, the USOC has developed a number of unique programs designed to promote and attract the best athletes for each Team. With respect to the Paralympic Team, the USOC has emphasized grassroots programs aimed at developing interest and expertise in these sports from the ground up. That makes sense because, compared to most sports featured at the Olympic Games—such as track and field and basketball—the sports at the Paralympic Games—such as wheelchair racing and wheelchair basketball—have no established pipelines for developing athletic talent, such as youth, high school, and college athletic programs. Accordingly, the USOC has developed a network of Paralympic Sports Clubs, which are designed to cultivate Paralympic sport participation at the local level. Similarly, the USOC oversees veterans' sports activities, and offers direct support to athletes training for the Paralympic Team.[3]

3. With respect to the United States Olympic Team, there is no similar need to develop grassroots programs for already-established sports. Instead, the USOC principally supports the U.S. Olympic Team by providing significant funding to the National Governing Bodies—such as USA Swimming and USA Gymnastics—that oversee and train the

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[3] The direct benefits afforded Paralympic athletes today are different than they were in 2003 when this case was filed; today's top Paralympic athletes are eligible for health insurance, grants, tuition assistance, and medal-prize money. The USOC's various direct athlete support programs have evolved in response to the availability of resources and the needs of the Teams.

elite U.S. amateur athletes training for the Olympic Games.

This case though concerns another tool that the USOC uses to attract the best athletes for the U.S. Olympic Team: the Athlete Support Program. Under this program, the USOC provides several types of grants, tuition assistance, and health insurance to athletes who satisfy a single eligibility criterion: the applicant must be someone who is "eligible to represent the United States and who intend[s] to compete, if selected, in the next Olympic or Pan American Games." C.A. J.A. 110. The Athlete Support Program is offered on a completely nondiscriminatory basis. The USOC does not ask whether an applicant is disabled; all that matters is that the applicant is eligible to represent the United States at the Olympic Games. If so, the athlete qualifies for the benefits—regardless of whether he or she has a disability.

Needless to say, conditioning benefits on being able to compete on the U.S. Olympic Team will make it difficult for certain individuals with disabilities to qualify. But that is no different than a university scholarship reserved for those who play on the school's basketball team or the government's G.I. Bill reserved for those who are physically fit enough to enlist in the Armed Forces. So long as all individuals—whether they have a disability or not—are offered equal access to the programs, federal law recognizes no violation. *See infra* 12-19.

And disabled athletes are hardly strangers to the Olympic Games. *See* Jere Longman, *An Amputee Sprinter: Is He Disabled or Too-Abled?*, N.Y. Times,

May 15, 2007, at A1. Marla Runyon, an elite athlete who is also legally blind, represented the United States in the 1500-meter race at the 2000 Olympic Games. Because she was a member of the U.S. Olympic Team, she was eligible to receive—and did in fact receive—benefits under the USOC's Athlete Support Program. C.A. J.A. 89, 133. Ms. Runyon's experience indeed refutes one of the principal canards repeated early and often in the petition: that Paralympic athletes are "barred" from the Athlete Support Program. Pet. 11. They are not barred; rather, only Olympic athletes qualify. As Ms. Runyon's case shows, that facially neutral eligibility criterion provides equal access to the Athlete Support Program for able-bodied and disabled athletes alike.

Many other individuals with disabilities have likewise represented the United States in the Olympic Games, including, among others: Jim Abbott, a starting pitcher for the 1988 U.S. Olympic Team, who was born without a right hand[4]; Greg Barton, "who was born with club feet * * * and walks on the balls of his feet," but who still won two gold medals in kayaking at the 1988 Olympic Games (the first American to win a gold in kayaking in 52 years)[5]; Jeff Float, a swimmer at the 1984 Olympic Games, who is deaf[6]; Dave Wharton, a swimmer at

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[4] *See* Dave Anderson, *Sports of the Times*, N.Y. Times, Mar. 9, 1989, at D27.

[5] William N. Wallace, *Barcelona Profile; 4th Time Around, and Still Paddling!*, N.Y. Times, July 12, 1992, at B3.

[6] *See* Brian Cazeneuve, *Catching Up with . . . Jeff Float, Olympic Swimmer*, Sports Illustrated, Apr. 7, 2003, at 14.

the 1988 Olympic Games, who is also deaf[7]; and George Eyser, a gymnast who had lost his left leg to a train accident but still won six medals at the 1906 Olympic Games, three of which were gold.[8] And that does not even count the many disabled athletes from other countries that have competed in the Olympic Games.[9] Nor does it count—because the USOC does not ask about disability—the hundreds of U.S. Olympic athletes who have likely had some less visible but still serious impairments, like reproductive-health disabilities. *Cf. Bragdon* v. *Abbott*, 524 U.S. 624, 639 (1998) (recognizing that impairments that substantially limit the "major life activity of reproduction" constitute disabilities).[10]

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[7] *See Swim Shorts*, Time, Sept. 19, 1988, *available at* http://www.time.com/time/magazine/article/0,9171,968469,00.html.

[8] *See* Longman, *supra*, at A1.

[9] These include Neroli Fairhall, a paraplegic who represented New Zealand in the 1984 Olympics as an archer, *see* Longman, *supra*, at A1; Terence Parkin, a deaf swimmer who won a silver medal for South Africa at the 2000 Olympic Games, *see id.*; Paolo Fantato, an archer who was confined to a wheelchair due to polio and who represented Italy in the 1996 Olympic Games, *see Wheelchair Archer Loses*, N.Y. Times, July 30, 1996, at B13; and Natalie du Toit, an amputee swimmer who will represent South Africa at the 2008 Olympic Games, *see Natalie du Toit: Defiant Amputee To Go the Distance*, Australian Broadcasting Corp., June 26, 2008, *available at* http://www.abc.net.au/news/stories/2008/06/21/ 2281671.htm.

[10] Eric Shanteau, a member of the 2008 U.S. Olympic Team, announced just several weeks ago, after he qualified for the Games, that he has testicular cancer. *See* Katie Thomas, *U.S. Swimmer Makes Tough Choice to Compete*, N.Y. Times, July 12, 2008, at D1. Despite his disability, Mr. Shanteau was—and remains—eligible for the Athlete Support Program.

4. Petitioners, all former or current members of the U.S. Paralympic Team, sued the USOC under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and Section 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a). But, as the District Court later recognized, the claims they brought "push[ed] the margins of federal disability discrimination laws." Pet. App. 22a. That is because the plaintiffs were not alleging that the USOC denied them access to the Athlete Support Program "by reason" of a disability. And they conceded--as they did again on appeal to the Tenth Circuit—that they were "not asking for any modification to the physical or athletic eligibility requirements for any Olympic or Pan-American sport." Hollonbeck C.A.10 Br. 34. Instead, petitioners proposed an entirely novel theory of antidiscrimination liability: that the USOC must provide equal benefits across its different programs designed for different athletes competing in different international competitions.[11]

Petitioners offered a series of evolving arguments in support of that newly minted theory below. In the District Court, petitioners principally urged the court to read into the Rehabilitation Act a proportional funding requirement akin to that mandated by the Department of Education's Title IX regulations. The District Court roundly rejected the argument, declining "Plaintiff's request that [the court] graft a remedial scheme promulgated under a statute banning sex discrimination onto statutes prohibiting

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[11] The International Olympic Committee oversees and organizes the Olympic Games. An entirely separate entity, the International Paralympic Committee, is responsible for overseeing the Paralympic Games.

disability discrimination." Pet. App. 37a-38a. Focusing on the text and precedents of those disability-discrimination statutes, the District Court concluded that "it is irrelevant that the USOC chooses to provide Olympic [Team benefits] only to Olympic athletes as long as the gateway to that program operates in a nondiscriminatory manner." Pet. App. 70a. Because the gateway to the Athlete Support Program indeed operates in a nondiscriminatory manner—*any* athlete, disabled or not, who is eligible to compete on the U.S. Olympic Team is eligible for the benefits—the District Court ruled in the USOC's favor. *Id.*

The Tenth Circuit affirmed. In doing so, it first rejected petitioners' argument that the Rehabilitation Act's definition of "program or activity" creates "a parity requirement across an institution's individual programs." Pet. App. 13a. The court recognized that the "program or activity" definition simply "expand[s] the application of * * * the Rehabilitation Act * * * to an entire institution if any part of the institution receives federal funds." Pet. App. 8a-9a n.1. Because, under the parties' stipulated facts, "[t]here is no dispute that the Rehabilitation Act applies to all of the USOC's programs," the Tenth Circuit found petitioners' parity argument based on the "program or activity" definition "inapposite." *Id.*[12]

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[12] The Tenth Circuit did not, as petitioners represent, find that "[S]ection 504 simply did not apply" to the USOC in this case. Pet. 13. It was petitioners' proposed argument under the Act's "program or activity" definition that did not apply. Pet. App. 8a-9a n.1.

Nor did the Tenth Circuit find fault in limiting the Athlete Support Program to just those athletes eligible to represent the United States in the Olympic Games. The court observed that the "Olympic athlete" designation "clearly does not contain an explicit requirement of not being disabled." Pet. App. 12a. Accordingly, because that eligibility criterion is facially neutral and is not "'directed at an effect or manifestation of a handicap,'" the Tenth Circuit ruled that the USOC does not violate Section 504 in administering the Athlete Support Program. Pet. App. 14a. Ultimately, the Tenth Circuit—like the District Court—concluded that, should petitioners wish to pursue their claim, they "should seek a remedy with the legislative or executive branches, not the courts." Pet. App. 14a-15a; *see also* Pet. App. 70a.

Petitioners sought rehearing en banc, alleging eight distinct claims of legal error. The last issue raised in their petition for rehearing—appearing on page 12 of their 13-page brief—was the novel "program or activity" question they now raise as the sole question in their petition for certiorari. The Tenth Circuit denied rehearing en banc, with six judges voting in favor of rehearing. Pet. App. 72a. None of those six judges, however, wrote separately to explain why they would have reheard the case or which (if any) of the eight points raised in the petition for rehearing they thought the panel got wrong.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS A CORRECT APPLICATION OF SETTLED LEGAL STANDARDS TO THE UNIQUE FACTS OF THIS CASE.

1. Section 504(a) of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, * * * be denied the benefits of, or be subjected to, discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). As this Court has emphasized, the "central purpose" of this nondiscrimination mandate "is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals." *Traynor* v. *Turnage*, 485 U.S. 535, 549 (1988) (quoting *Choate*, 469 U.S. at 304). That concern for evenhandedness dictates the proper inquiry under Section 504: What matters is whether there is an equal "*opportunity* for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Choate*, 469 U.S. at 302 (emphasis added). An entity thus honors the Act's nondiscrimination mandate so long as disabled and able-bodied individuals alike enjoy equal access to each of the entity's various programs. *See id.*

The USOC offers precisely that. In deciding who qualifies for the Athlete Support Program, the USOC employs a facially neutral restriction: "athletes who are eligible to represent the United States and who intend to compete, if selected, in the next Olympic or Pan American Games." C.A. J.A. 110. That lone criterion—whether the applicant is eligible to

represent the United States at the Olympic Games—"does not distinguish between" individuals "on the basis of any test, judgment, or trait" that has anything to do with disability. *Choate*, 469 U.S. at 302. All that matters is that the athlete—disabled or otherwise—is eligible to compete in the next Olympic Games.

2. Petitioners do not dispute that the USOC is entitled to fashion a specific benefits package aimed at attracting the highest caliber Olympic athletes (just as a university offers basketball scholarships to attract the best basketball players). Nor do petitioners dispute that the criterion the USOC uses—eligibility for the U.S. Olympic Team—is a facially neutral classification (just as restricting a basketball scholarship to those on the basketball team draws no distinction based on disability).

Instead, petitioners ask this Court to grant certiorari to consider a novel rule that few courts have considered and none have endorsed: An entity must ensure that money and resources are "*allocated fairly*" among its many different programs. Pet. 9 n.5 (brackets deleted, emphasis added); *see also id.* at i, 16, 17, 18. Without citing a single decision from this Court or any court of appeals, petitioners insist that Section 504 should not only "forbid * * * discrimination *within* a particular recipient-created program," but should also "apply to discrimination by a recipient in the allocation of a benefit *between* two or more programs." Pet. 17 (emphases in original). Under petitioners' new rule, the USOC would thus have to ensure that "the level of benefits for the Paralympic athletes ha[s] to be 'equitable' or in some

sense 'proportionate'" to those offered in the separate Athlete Support Program. Pet. 9

But as the Tenth Circuit recognized, Section 504 requires no such thing. Pet. App. 8a-11a. More than two decades ago in *Choate*, this Court emphasized that "[t]he Act does not * * * guarantee the handicapped equal results." 469 U.S. at 302. Here, so long as the USOC offers equal access to its Athlete Support Program to able-bodied and disabled athletes alike, it does not matter whether a different program designed for different athletes competing in different sports at different competitions receives "equitable," "proportionate," or some other indeterminate quantum of benefits.

3. Petitioners nevertheless insist that their all-programs-must-be-funded-equally rule is dictated by the plain language of Section 504. The key textual phrase that anchors their entire theory is the Act's "definition of 'program' under Section 504." Pet. 16. According to petitioners, this definition "is of considerable importance because it determines the nature of the anti-discrimination prohibition." *Id.*

Not so. That definition provides, in relevant part, that "the term 'program or activity' means all of the operations of * * * an entire corporation * * * if assistance is extended to such corporation * * * as a whole." 29 U.S.C. § 794(b). By its plain terms, the clause merely speaks to the breadth of an entity's compliance obligation; it makes entire institutions subject to the Act even if just a portion of the institution receives federal funds. What it most certainly does not do is modify the substantive standards for evaluating whether an entity receiving

financial assistance has discriminated "solely by reason of * * * disability." 29 U.S.C. § 794(a).

Indeed, until 1987, the Rehabilitation Act, Title VI, Title IX, and the Age Discrimination Act did not even contain a "program" definition. Rather, Congress added the definition to those statutes through the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. In adopting that definition, Congress had no intention of modifying the substantive "nature of the anti-discrimination prohibition." Pet. 16. As this Court has observed on multiple occasions, the only reason Congress added the "program" definition was "to correct what it considered to be an unacceptable decision on [this Court's] part in *Grove City College* v. *Bell*, 465 U.S. 555 (1984)," which had concluded that Title IX covered only the specific program receiving federal funding. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 73 (1992); *see National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 466 n.4 (1999). Thus, all the "program" definition did was to clarify that "if any part of [an entity] receive[s] federal assistance, all [its] operations would be subject to" the Rehabilitation Act. *Smith*, 525 U.S. at 466.

The petition notably fails to cite *Franklin*, *Smith*, or any other decision from this Court construing the "program" definition. *See, e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). And for good reason. This Court has rejected all previous attempts to make more of the "program" definition than its language and purpose could bear. For example, in *Sandoval*, the plaintiffs argued that the "program" definition effectively created a private right of action to enforce the disparate-impact

regulations under Title VI. But this Court squarely rejected that argument, emphasizing the narrow purpose of the definition and finding that "it is impossible to understand what [the "program" definition] has to do with implied rights of action." *Sandoval*, 532 U.S. at 292. Similarly, in *Franklin*, this Court held that the "program" definition had no substantive impact on the Title IX private right of action this Court recognized in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). As the Court explained, Congress adopted the definition "[w]ithout in any way altering the existing rights of action and the corresponding remedies permissible under Title IX, Title VI, § 504 of the Rehabilitation Act, and the Age Discrimination Act." 503 U.S. at 73.

4. Because this Court unanimously held more than 20 years ago that the Rehabilitation Act "does not * * * guarantee the handicapped equal results," but instead guarantees equal "opportunity * * * to participate in and benefit" from a federal recipient's various programs, *Choate*, 469 U.S. at 302, few parties have ever advocated the novel rule urged by petitioners here. But the two circuits that have considered the rule have roundly rejected it, just as the Tenth Circuit did below.

In *Does 1-5* v. *Chandler*, 83 F.3d 1150 (9th Cir. 1996), the Ninth Circuit considered—and rejected—a claim that the federal disability-discrimination statutes "require equivalent benefits in different programs." *Id.* at 1155. There, the State of Hawaii had created two different welfare programs with two different levels of benefits: one designed for individuals with dependent children—which had no durational limit—and another for individuals with

disabilities—whose benefits terminated after just one year. *Id.* at 1151-52. The plaintiffs argued that Hawaii discriminated against the disabled by imposing time limits on a program designed to assist the disabled while offering infinite benefits for the program aimed at helping individuals with dependent children. The Ninth Circuit disagreed, ruling that the two programs established by Hawaii did not "den[y] benefits based on disability." *Chandler*, 83 F.3d at 1155. That was because the able-bodied and the disabled alike had an equal opportunity to obtain the better benefits package, since "disabled people with children were not excluded from full participation in the program." *Id.*

The Second Circuit, like the Ninth Circuit in *Chandler* and the Tenth Circuit below, has likewise rejected the rule that an entity must provide equal benefits to different programs designed to promote different goals. In *Castellano* v. *City of New York*, the city had created two separate retirement funds for police officers and fire fighters: one for "for service" retirees—meaning they worked a full 20 years on the job—and another fund for those who had retired earlier "with a disability." 142 F.3d at 63-64. Those who retired "for service" qualified for a supplemental benefits package; those who retired "with a disability" did not. *Id.*

The Second Circuit held that these different benefits packages did not violate Section 504 of the Rehabilitation Act or the ADA. In reaching that result, the court recognized that the disability-discrimination statues "require[ ] only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have

given an equivalent amount of service." *Id.* at 70. The city did not violate that requirement because the supplemental retirement benefits were "available equally to persons with and without disabilities who retire after twenty years of service." *Id.* As the court explained, the Rehabilitation Act does not require that different programs "provide the same level of benefits, because they are two separate benefits which serve different purposes." *Id.* And the Ninth Circuit just recently reached the same result in a closely analogous case. *See Brown* v. *City of Los Angeles*, 521 F.3d 1238, 1242 (9th Cir. 2008) ("The two programs need not provide identical benefits.").

Notably, the Second Circuit in *Castellano* relied heavily on guidance offered by the Equal Employment Opportunity Commission (EEOC). That guidance roundly refutes the novel rule petitioners have advocated. One of the hypotheticals that the EEOC's guidance poses is virtually indistinguishable from the issue in this case: "If an employer provides a disability retirement plan, is it permissible under the ADA for that plan to provide lower levels of benefits than the same employer's service retirement plan?" EEOC Notice No. 915.002, Questions & Answers (May 11, 1995), *available at* http://www.eeoc.gov/policy/docs/qadsre.html. The Commission categorically states that "[n]one of these [arrangements] would violate the ADA *under any theory of discrimination*." *Id.* (emphasis added). That is because "none of the plans make distinctions based on whether or not an individual is covered under the ADA. Thus, * * * the service retirement plan is available to all employees who have attained 20 or more years of service, without regard to the presence or absence of a disability." *Id.* As with the

Rehabilitation Act, "[t]he ADA does not require that service retirement plans and disability retirement plans provide the same level of benefits, because they are two separate benefits which serve different purposes." *Id.*

That, of course, is exactly what the USOC does. Just like a "for service" retirement plan, the USOC's Athlete Support Program is available to all athletes who are eligible to represent the United States at the Olympic Games "without regard to the presence or absence of a disability." *Id.* The fact that the USOC provides a different set of benefits for a different group of athletes who are training for a different series of competitions has no relevance when assessing whether *access* to the Athlete Support Program operates without regard to disability. As in *Castellano*, "they are two separate benefits which serve different purposes." 142 F.3d at 70.

Because the Tenth Circuit correctly applied settled precedents to the facts of this case, this Court should deny the petition.

II. THE DECISION BELOW CONFLICTS WITH NONE OF THIS COURT'S DECISIONS OR WITH ANY DECISION FROM THE COURTS OF APPEALS.

Not surprisingly given the settled state of the law and the unusual facts of this case, petitioners are unable to identify a single conflict of authority warranting this Court's review. Petitioners allege a conflict with only two other circuits, *see* Pet. 28-33, but those alleged conflicts fail to materialize.

1a. *Rodde* v. *Bonta*, 357 F.3d 988 (9th Cir. 2004), presents no conflict for a variety of reasons. To begin

with, *Rodde* arose under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12165, not Section 504 of the Rehabilitation Act. *See id.* at 993. That is important because Title II of the ADA does not contain the "program" definition that the petition insists "is of considerable importance" in "determine[ing] the nature of the anti-discrimination prohibition" of Section 504. Pet. 16. For that reason alone, *Rodde* neither forges a conflict with the decision below nor supports petitioners' novel rule of decision.

Rodde, in fact, undermines petitioners' principal argument that the "program" definition "determines the nature of the antidiscrimination mandate." Pet. 16. That is because Congress, the courts, and even petitioners below have recognized that "Title II [of the ADA] 'essentially simply extends the anti-discrimination prohibition embodied in Section 504 * * * to all action of state and local governments." Hollonbeck C.A.10 Br. 25 n.5 (quoting *Chaffin* v. *Kansas State Fair Bd.*, 348 F.3d 850, 859 (10th Cir. 2003) (quoting H.R. Rep. No. 101-485, pt. 2, at 84 (1990))). But if the ADA does replicate the Rehabilitation Act's "anti-discrimination prohibition"—and we agree with petitioners that it does—then the Rehabilitation Act's substantive antidiscrimination prohibition must necessarily be tied to something other than the "program" definition. Otherwise, the ADA—which lacks such a provision—would not mirror the Rehabilitation Act in substance.

There are further problems still with *Rodde*. By relying so extensively on an ADA case, the petition raises a number of troubling questions of first impression that strongly counsel against certiorari.

For example, would petitioners' novel reading of "program or activity"—requiring equality "in the allocation of a benefit *between* two or more programs," Pet. 17 (emphasis in original)—extend to Title II of the ADA? And what about Title III, which applies the ADA's non-discrimination mandate to private businesses and entities that operate "places of public accommodation"? *See* 42 U.S.C. § 12182(a); *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128 (2005) ("Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations."). After all, courts have "consider[ed] cases dealing with each Act as applicable and interchangeable." *Mershon* v. *St. Louis Univ.*, 442 F.3d 1069, 1076 n.4 (8th Cir. 2006) (quotation omitted). Yet it would radically transform Title III's nondiscrimination mandate if private businesses suddenly had to ensure not just equal access to all of their programs and operations but also that all "benefits be allocated fairly" (Pet. 9 n.5) among those programs and operations.[13]

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[13] Take, for example, the Boston Marathon, which would be covered by Title III of the ADA. *See PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 677 (2001). The Marathon's organizers offer $15,000 in prize money to the winner of the wheelchair marathon, but $100,000 to the winner of the traditional marathon. *See* http://www.boston.com/marathon/runners/prize.htm. Under petitioners' theory, the organizers would have to provide " 'equitable or in some sense 'proportionate' " (Pet. 9) prize money for those two different races. By the same token, no one questions the disparity in prize money awarded to winners on the PGA Tour and winners on the Champions Tour (reserved exclusively for golfers over 50, formerly known as the Senior Tour). But under petitioners' theory, if the PGA received federal funds of some sort, it would violate the Age Discrimination Act unless it offered lock-step prize pools for the two different tours.

Because no other circuit has ever contemplated such an expansive rule—let alone adopted it—this Court would need to resolve these thorny questions in the first instance without the guidance and experience of the regional courts of appeals. For that reason alone, the Court should deny certiorari and allow the issue—to the extent it ever comes up again—to percolate in the lower courts.

Finally, *Rodde* presents no conflict because the decision did not even address the question presented in the petition—whether two separate programs must offer "equitable" or "proportionate" benefits. Rather, the question in *Rodde* implicated traditional equality of access concerns—whether disabled individuals were denied equal access to a single program. There, the County of Los Angeles offered medical services on a county-wide basis to all residents who qualified for Medicaid. *See* 357 F.3d at 990. In order to provide disabled residents with "meaningful access" to that general program—as the Rehabilitation Act's regulations and case law require[14]—the County consolidated in one hospital much of the equipment and personnel needed to effectively treat certain disabled individuals. *See id.* at 990-991. When the County later sought to close that hospital, the question was whether "the closure * * * would deny certain disabled individuals meaningful access to government-provided services because of their unique needs." *Id.* at 998. The

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[14] *See* 28 C.F.R. § 35.130(b)(1)(iv); 45 C.F.R. § 84.4(b)(1)(iv); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 413 (1979) ("[A] refusal to modify an existing program [to accommodate the needs of the disabled] might become unreasonable and discriminatory.").

Ninth Circuit held that it would. But the court reached that result through a straightforward application of settled ADA precedent, finding that the plaintiffs would be effectively denied access to a single program open to everyone else. Nowhere did the court of appeals suggest that it was evaluating two separate programs—much less mandate that all of the county's programs receive across-the-board equal funding.

b. The only other decision that petitioners contend conflicts with the ruling below is *Klinger* v. *Department of Corrections*, 107 F.3d 609 (8th Cir. 1997). But it likewise presents no actual conflict. Pet. 30-32. To begin with, *Klinger* was brought under Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681(a), not Section 504 of the Rehabilitation Act. There, prisoners at an all-female prison sued Nebraska, arguing that the men at one particular all-male prison received better educational benefits. The Eighth Circuit found, based on the facts of that case, that the proper "program" to evaluate in considering whether the plaintiffs were denied equal educational opportunities was not any specific male prison but instead the "Nebraska prison system as a whole." *Id.* at 615.

In reaching this result, the Eighth Circuit emphasized the "unique context" of sex-segregation in a prison system. *Id.* at 616. It observed, for example, that "[i]t is beyond controversy that male and female prisoners may lawfully be segregated into separate institutions within a prison system." *Id.* at 615. It therefore concluded that, "[w]hen considering single-sex prisons, the only logical and workable application of the definition of 'program or activity'

under Title IX requires comparison of educational opportunities for female and male prisoners within the entire system of" state prisons. *Id.* at 616. Other circuits have likewise recognized the *sui generis* nature of applying Title IX to prisons. *See, e.g.*, *Jeldness* v. *Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) ("Prisons are different from other institutions to which Title IX applies. Security is an important concern. And sex segregation is the accepted norm.").

Even outside the prison context, Title IX has limited application to the question here. As the Tenth Circuit below correctly recognized, courts "cannot modify the Rehabilitation Act to reach a result in [petitioners'] favor absent statutory or regulatory authority to import, wholesale, Title IX regulations and precedent into § 504." Pet. App. 14a. Furthermore, although petitioners insist that "this Court has repeatedly noted [that] section 504 was based on the similarly worded provisions of Title VI," and shares the same "program or activity" language as "Title IX of the Education Act Amendments of 1972," Pet. 21-22, they neglect to mention this Court's key caveat: that "too facile an assimilation of Title VI law to § 504 must be resisted." *Choate*, 469 U.S. at 291 n.7.

Despite that caution, petitioners spill much ink discussing the role that Title IX plays in collegiate athletics—and the role petitioners want it to play in this case. *See* Pet. 23-25, 31-33. But the rules mandating "substantially proportionate" athletic opportunities for male and female students at U.S. colleges and universities derive from detailed *regulations* issued by the Department of Education.

See 36 C.F.R. pt. 106; Policy Interpretation—Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979). What is more, those regulations do not even require, as petitioners would, that the "level of benefits * * * be 'equitable' or in some sense 'proportionate.'" Pet. 9. To the contrary, the Department of Education's regulations provide that "[u]nequal aggregate expenditures for numbers of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will *not* constitute noncompliance." 34 C.F.R. § 106.41(c) (emphasis added). And not to put too fine a point on matters, but the Departments of Justice and Health and Human Services—the two agencies charged with administering the Rehabilitation Act and the ADA—have *never* promulgated any regulations that even hint at a Title IX-like framework. *Klinger*, in short, creates no conflict with the decision below.

2a. Petitioners point to two vague "conflicts" between the decision below and this Court's decisions. First, they suggest that the decision below conflicts with *Choate*'s observation that the "benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." Pet. 24-25 (quoting *Choate*, 469 U.S. at 301). Never mind that this aspect of *Choate* has nothing whatsoever to do with the question presented by the petition—which deals exclusively with the meaning and scope of the "program or activity" language of Section 504. Pet. i. But even if the petition had presented a second question that fairly implicated this portion of *Choate*, there would be nothing certworthy about it. The Tenth Circuit,

after all, did not reject, modify, or otherwise disagree with this well-settled principle. At best, the petition merely complains about "the misapplication of a properly stated rule of law." S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the error consists of * * * the misapplication of a properly stated rule of law.").

In any event, the Tenth Circuit did not misapply *Choate*. The benefit here—the USOC's Athlete Support Program—is not "defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Choate*, 469 U.S. at 301. There is but one criterion for gaining access to that benefit: the individual must be eligible to represent the United States at the Olympic Games. There is nothing discriminatory about that; the eligibility criterion is "neutral on its face, [and] does not distinguish * * * on the basis of any test, judgment, or trait" that is rooted in disability. *Choate*, 469 U.S. at 302. All athletes—regardless of whether they have a disability or not—can qualify for the benefit. To be sure, many individuals with mobility impairments may have difficulty qualifying for the Olympic Team, given the nature of the sports featured in the Olympic Games. But the same is true of the federal G.I. Bill, which is reserved for those who enlist in the Armed Forces—where individuals with mobility impairments may have difficulty qualifying. Likewise, students with mobility impairments may find it difficult or even impossible to qualify for a university scholarship reserved for members of the basketball or football teams. Yet the difficulty that disabled individuals may face in qualifying for these programs does not transform a facially neutral

eligibility criterion into an invidious exclusion. *See Choate*, 469 U.S. at 302.[15]

b. It is difficult to understand why petitioners think the decision below conflicts with *Grove City College* v. *Bell*, 465 U.S. 555 (1984). *See* Pet. 26. As we explained, *supra* 15, when that case was decided, the Rehabilitation Act contained no definition for "program or activity." In *Grove City*, this Court interpreted the "program or activity" language narrowly, holding that only the specific department receiving federal financial assistance—in that case, the college's financial aid office—was required to comply with Title IX (and, by extension, the Rehabilitation Act, the Age Discrimination Act of 1975, and Title VI). 465 U.S. at 573-574. Congress subsequently abrogated *Grove*, and this Court has consistently recognized that the "program" definition did not "in any way alte[r] the existing rights of action and the corresponding remedies permissible under the Rehabilitation Act." *Franklin*, 503 U.S. at 73; *accord Sandoval*, 532 U.S. at 292. Nothing in the Tenth Circuit's decision remotely conflicts with *Grove City*.

4. Unable to identify any actual conflict with the decisions of this Court or any circuit court,

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[15] Under petitioners' theory, the USOC would also violate the Act by spending more money on swimming (which tends to disqualify more mobility-impaired athletes) than on archery (which more mobility-impaired athletes can perform). Not only would such outcomes turn the disability-discrimination legislation on its head; it also would conflict with the rule adopted by the EEOC and put to practice by the Second and Ninth Circuits in *Castellano*, *Chandler*, and *Brown*.

petitioners spend much of their time hypothesizing potential future conflicts that may—or may not—ever come to pass. *See, e.g.*, Pet. 22 ("The Tenth Circuit decision opens the door to discrimination on the basis of race, color, national origin and gender * * *."); *id.* 23 ("The Tenth Circuit decision would have a similar impact on the effectiveness of Title IX."). Backed by not a single citation, petitioners' parade of horribles turns out to be not nearly as frightening as they imagine. Indeed, there are decisions from this Court—which the petition neglects to cite—that have found nothing illegal or unconstitutional about some of the scenarios petitioners conjure.

Take, for example, the hypothetical about "higher education systems in the South [that] often include one or more colleges or universities which are overwhelmingly white and others which are predominately non-white." Pet. 22. Petitioners point out that "[u]nder the Tenth Circuit's interpretation of 'program,' the largely white University of Mississippi would constitute a different program than the overwhelmingly black Jackson State University." *Id.* 22-23. They find this troubling because, if Mississippi officials elected to pour more resources into the University of Mississippi than into Jackson State University, "the Tenth Circuit decision would immunize that decision from examination under Title VI." *Id.* 23.

But in *United States* v. *Fordice*, 505 U.S. 717 (1992), this Court concluded—on facts that are virtually indistinguishable from petitioners' Mississippi hypothetical—that universities are indeed free to do exactly that. In *Fordice*, this Court

considered whether Mississippi had met its obligation under *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954), to dismantle its prior dual system of public universities. Under that system, historically white institutions (HWI's) like the University of Mississippi "received the most funds, initiated the most advanced and specialized programs, and developed the widest range of curricular functions," while historically black institutions (HBI's) like Jackson State "were more limited in their assigned academic missions." *Fordice*, 505 U.S. at 739. Although the Court ultimately remanded for further findings, it rejected any claim that the Equal Protection Clause forbids a State from assigning different educational missions to its different universities and, in turn, funding them differently according to those prerogatives where there is no discriminatory animus: "We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions in a State's higher education system would raise an equal protection issue where one or more of the institutions become or remain predominately black or white." *Id.* at 741.[16] And directly refuting the hypothetical that petitioners set forth in the petition, Justice Scalia separately noted that: "Among petitioners' contentions is the claim that the Constitution requires Mississippi to correct

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[16] Although *Fordice* was decided under the Equal Protection Clause, not Title VI, this Court has held that the two are co-extensive: "Title VI proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003) (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.)).

funding disparities between its HBI's and HWI's. The Court rejects that—as I think it should—since it is students and not colleges that are guaranteed equal protection of the laws." *Id.* at 759 (Scalia, J., concurring in part and dissenting in part).[17]

Petitioners are therefore exactly wrong in suggesting that "[t]he Tenth Circuit decision opens the door" to additional forms of discrimination. Pet. 22. The decision below instead faithfully applies this Court's precedents, which make clear that individuals must receive equal opportunities to vie for the same programmatic benefits, not that different programs must receive equal funding. Because petitioners are unable to establish a conflict with even a hypothetical—let alone an actual decision—the petition should be denied.

III. THIS CASE IS A POOR VEHICLE FOR REVISITING SETTLED ANTIDISCRIMINATION PRECEDENTS.

The question presented in this case broadly implicates the meaning of Section 504's "program or activity" language. As the petitioners themselves point out, that same statutory formulation appears in dozens of other federal antidiscrimination statutes. Pet. 15. But there are three reasons why this case presents an exceptionally poor vehicle for considering a new rule of construction that, if adopted, would radically reshape the

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[17] This Court in *Fordice* remanded with instructions to identify the most appropriate remedy for Mississippi's entrenched history of *de jure* segregation, including possible modifications to the State's public university program. Needless to say, petitioners' complaint against the USOC did not, nor could it, allege any history of *de jure* segregation.

nondiscrimination mandate of roughly 29 federal laws. *See* Pet. App. 74a-76a.

First, the Court should deny the petition because it is entirely unclear what remedy petitioners would be entitled to if Section 504 were construed to regulate "the allocation of a benefit *between* two or more programs." Pet. 17 (emphasis in original). No court in the country—including the court below—has ever examined how federal courts would audit the budgets of corporations, universities, and governments to ensure that they had distributed benefits "fairly." Even petitioners have demonstrated some uncertainty over the proper remedy. The petition itself acknowledges that, at various times "[i]n the litigation in the courts below," petitioners advocated that "the level of benefits for Paralympic athletes had to be 'equitable' or in some sense 'proportionate.' " *Id.* 9. Recognizing the fatal indeterminacy of these standards, a footnote in the petition insists that "plaintiffs were asking only that the USOC benefits be 'allocat[ed] fairly.' " *Id.* 9 n.5 (alteration in original).

But "equitable," "proportionate," and "allocated fairly" are protean terms that—standing alone—are meaningless. This Court should not pass upon the novel question presented in the petition before the regional courts of appeals have had an opportunity to consider the impact of the petitioners' rule. Depending on how lower courts define "equitable" or "proportionate" or "allocated fairly," universities, non-profit organizations, state and federal governments, and many other businesses and institutions subject to the Rehabilitation Act might face colossal liabilities and need to fundamentally

restructure entire departments, programs, and missions. By allowing this issue to percolate in the lower courts—and by waiting until at least one circuit actually adopts petitioners' rule—this Court will be able to reach a sounder decision in the event it wishes to review the question in the future.

The second reason why this case would be a poor candidate for certiorari is because it turns on a set of highly idiosyncratic facts. Petitioners throughout this litigation have emphasized the unique and special role that Congress assigned the USOC under an entirely different statute: the ASA, 36 U.S.C. § 220501 *et seq.* *See, e.g.*, Hollonbeck C.A.10 Br. 11-13, 35-36; J.A. CA.10 247. They argued that the USOC had an obligation to ensure some measure of parity between the Olympic and Paralympic Teams because, among other reasons, "the ASA * * * gives [the USOC] responsibility for all 'matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games.'" Hollonbeck C.A.10 Br. 11 (quoting 36 U.S.C. § 220503(3)(A)). Underscoring the unique role that the ASA has always played in their discrimination claims, petitioners insisted below that the term "amateur athlete," which is defined in the ASA, "is *central* to understanding what the USOC does and who it serves." *Id.* (emphasis added). Petitioners likewise quoted early and often in their briefs below a snippet of the ASA's legislative history that "described the Paralympics as 'the Olympics for disabled amateur athletes.'" *Id.* 10 (quoting S. Rep. No. 105-325, at 2 (1998)); *accord* C.A. J.A. 247. Even Petitioners' own amici recognize that this case arises from the unique role the USOC

plays in organizing the Olympic and Paralympic Teams. National Fed. Blind Br. 12-14.

Because petitioners' claims of discrimination are so inextricably entwined with the peculiar role that Congress assigned the USOC in the ASA, this case is a poor vehicle for re-examining statutory language that could broadly affect the scope of Title VI, Title IX, and the Age Discrimination Act. Pet. 15. Thus, even if the Court were inclined to revisit the meaning of the "program or activity" clause, it should await another case in which the theory of discrimination does not hinge so critically on other highly specialized federal statutes.

Finally, petitioners' ultimate concern with how the USOC allocates its budget is better addressed by Congress exercising its legislative oversight, rather than by this Court re-interpreting settled Rehabilitation Act precedents. Under Section 220511(a)(4) of the ASA, the USOC must submit a "detailed report" every four years to both Houses of Congress that addresses, among other items, "data concerning the participation of * * * disabled individuals * * * in the amateur athletic activities and administration of the corporation," and a "description of the steps taken to encourage the participation of * * * disabled individuals * * * in amateur athletic activities." 36 U.S.C. § 220511(a)(3), (4). Given that Congress carefully monitors and assesses the opportunities for disabled individuals in amateur athletics, this Court should not exercise its discretionary jurisdiction to address petitioners' highly fact-specific concerns about direct Paralympic athlete funding.

* * *

In view of the unusual circumstances precipitating this action, we doubt that the question presented will recur soon or often. But if it does, this Court would almost certainly benefit from further deliberation by the lower courts and the joining of issues that comes only with the development of a true conflict.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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103

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In The Supreme Court of the United States

SCOT HOLLONBECK, et al.,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

Page

I. The Solicitor General Should Be Invited To File A Brief Expressing The Views of The United States 1

II. The Issues Presented Are Substantial..... 7

III. The Unique Importance And Responsibilities of The United States Olympic Committee Warrant Review of The Question Presented 10

Conclusion..... 15

Appendix 1a

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985).....*passim*

Auer v. Robbins, 519 U.S. 452 (1997).....6

Barnes v. Gorman, 536 U.S. 181 (2002).....6

Brown v. Board of Education, 347 U.S. 483 (1954).....11

Consolidated Rail Corporation v. Darrone, 465 U.S. 624 (1984).....1

National Collegiate Athletic Association v. Smith, 525 U.S. 459 (1999).....10

Southeastern Community College v. Davis, 442 U.S. 397 (1979).....1

United States Dept. of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986).....1

STATUTES

29 U.S.C. § 794(a).....1

42 U.S.C. § 12134(b).....4

Rehabilitation Act, Section 504.....*passim*

REGULATIONS

28 C.F.R. § 41.4(a).....8

28 C.F.R. § 41.51(b)(3).....8

28 C.F.R. § 41.51(b)(3)(1).....5

29 C.F.R. § 1630.7.....4

TABLE OF AUTHORITIES – Continued

Page

34 C.F.R. § 106.37(b)(1) 4

34 C.F.R. § 106.41(c) 3

45 C.F.R. § 84.46(a)(2) 4

OTHER AUTHORITIES

Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996) 7

Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71413 (1979) 7

S. Rep. No. 93-1297 2

I. THE SOLICITOR GENERAL SHOULD BE INVITED TO FILE A BRIEF EXPRESSING THE VIEWS OF THE UNITED STATES

The Rehabilitation Act assigns to the executive branch a central role in the interpretation of section 504. Section 504(a) requires each federal agency that provides federal assistance to issue regulations implementing the Rehabilitation Act, and mandates submission of those regulations to the appropriate authorizing committees of Congress.[1] Because the substantive requirement of the statute itself is set out in a single word ("discrimination"), delineating what constitutes "discrimination against the handicapped continues to be an important responsibility" of those federal agencies. *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

In construing section 504 this Court has repeatedly relied on section 504 regulations,[2] and has at times looked as well at regulations under similarly phrased federal anti-discrimination statutes.[3] In the instant case the significance of the various federal

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[1] 29 U.S.C. § 794(a).

[2] *United States Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 612 n.14 (1986); *Alexander v. Choate*, 469 U.S. 287, 297 n.17, 304-05 (1985); *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 633-34 (1984); *Southeastern Community College v. Davis*, 442 U.S. at 406, 412.

[3] *Alexander v. Choate*, 469 U.S. at 294 n.11; *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. at 612 n.14.

anti-discrimination regulations is a matter of dispute. In light of the substantial importance of those regulations to the question presented, the Solicitor General should be invited to file a brief expressing the views of the United States.

Petitioner has consistently urged that section 504 should be construed in light of the Title IX regulations. Not only is the language of Title IX and section 504 identical,[4] but the Title IX regulations expressly deal in detail with the very issue in this case – how the anti-discrimination requirement should apply where a recipient supports separate athletic teams because of differences in the physical capacities of the athletes involved. Respondent objects that the protections now accorded by federal law to girls' and women's sports programs derive, not from the text of Title IX, but from "detailed *regulations* issued by the Department of Education." (Br.Opp. 24-25; emphasis in original). But that is precisely the point; because the text of Title IX and section 504 are the same, the regulations under one can be instructive as to the meaning of the other.

The USOC suggests that the type of preferential treatment it accords to Olympic and Pan American Game athletes would be permissible under the Title IX regulations. (Br.Opp. 25). It relies on a Title IX

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[4] See S. Rep. No. 93-1297, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6390 (section 504 was "patterned after and is almost identical to the anti-discrimination language of" Title IX).

regulation stating in part that "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams ... will not constitute non-compliance with this section." 34 C.F.R. § 106.41(c). But the quoted language merely states that such inequality is not a per se violation; the remainder of the provision, not quoted by respondent, makes clear that such a disparity could be "consider[ed] ... in assessing equality of opportunity for members of each sex." *Id.* Section 106.41(c) explains that although no single type of disparity – e.g., unequal "equipment and supplies" – is a per se violation, all such differences are assessed in combination in determining whether a recipient has provided "equal athletic opportunity for members of both sexes."

Respondent argues that "the Department[ ] of ... Health and Human Services ... [has] *never* promulgated any [section 504] regulations that even hint at a Title IX-like framework." (Br.Opp. 25; emphasis in original). To the contrary, the Department of Health and Human Services has adopted just such a section 504 regulation. A recipient may administer a scholarship or other form of financial assistance

> on the basis of factors that ... have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

45 C.F.R. § 84.46(a)(2). This section 504 regulation regarding scholarships is essentially identical to the Title IX regulations regarding such financial assistance. See 34 C.F.R. § 106.37(b)(1).

Respondent urges that section 504 should be interpreted in light of an EEOC Policy Guidance regarding Title I of the ADA. (Br.Opp. 18-19). The USOC practice of limiting grants and tuition assistance to the Olympic and Pan American Games athletes, it contends, is "exactly" like a regular retirement plan which provides greater benefits than a disability retirement plan. (Br.Opp. 18-19). To the contrary, the analogous pension plan would be one which provides special higher pensions limited to retirees who had at one time been members of the United States Olympic Team. That type of pension plan would assuredly violate the EEOC ADA regulations, which expressly forbid employment practices with such a discriminatory effect. 29 C.F.R. § 1630.7. The text of the ADA, moreover, makes clear that only Title II of that statute (regarding state and local governments), not the employment provisions of Title I (at issue in the EEOC guidance), must be construed in a manner consistent with section 504. See 42 U.S.C. § 12134(b).

If the USOC provided general support for all athletes seeking to represent the United States at any of the major international competitions covered by the USOC charter, the USOC could not administer that assistance on a case-by-case basis in a manner that had the purpose or the effect of discriminating

against disabled Paralympic athletes. 28 C.F.R. § 41.51(b)(3)(1). The USOC's core argument is that it has avoided any obligations under section 504 by the way in which it has defined the benefits it provides. The USOC "Athlete Support Program" is not an athlete-support-program, but an "Athlete-competing-in-the-Olympics-or-Pan-American-Games" Support Program. The benefit at the USOC Training Center is a "Training-for-Paralympic-athletes-so-long-as-no-Olympic-or-Pan-American-Games-athlete-wants-to-use-the-facility" Center. The United States, however, has concluded, in a brief filed in this Court, that a recipient of federal funds may not avoid compliance with section 504 simply by incorporating otherwise impermissible limitations into the definition of the benefit being provided.

> One can conceive of the benefit being distributed ... [at] a rampless library ... as ... "books-in-a-building-without-ramps," and [a recipient then arguing] that *that* service is available equally to all .... [But] [a]ntidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is "collapsed" into one's definition of what is the relevant benefit.

Brief for the United States, *Alexander v. Choate*, 469 U.S. 287 (1985), at 28. This Court expressly quoted and adopted the government's interpretation of section 504. 469 U.S. at 301 n.21.

It would for several reasons be appropriate to invite the Solicitor General to file a brief expressing

the views of the United States. The United States has a substantial interest in the proper interpretation of section 504 and its implementing regulations, both of which are enforced by several dozen federal agencies.[5] The resolution of the instant case turns to a significant degree on the interpretation of the regulations implementing section 504 and other federal anti-discrimination laws; the government's interpretation of its own regulations is properly accorded substantial weight. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Executive Order 11250 confers upon the Attorney General responsibility for overseeing and coordinating all federal regulations implementing section 504, Title IX, and Title VI. Because the role of American teams in major international competitions at times has significant foreign policy implications, a consideration which may have prompted Congress to charter the USOC in the first place, an expression of the views of the United States regarding this particular controversy would be especially appropriate.

The USOC insists that it would be impractical to administer a rule forbidding discrimination against Paralympic athletes. The Department of Education, however, has extensive experience with the closely

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[5] In briefs filed with this Court, the United States has repeatedly emphasized its interest in the interpretation of section 504 and its implementing regulations. E.g., Brief for the United States as Amicus Curiae, *Barnes v. Gorman*, 536 U.S. 181 (2002), No. 01-682, at 1.

analogous problem of guaranteeing equal athletic opportunity to members of girls' and women's teams.[6] The government's views regarding this intensely practical issue would thus be of obvious relevance.

II. THE ISSUES PRESENTED ARE SUBSTANTIAL

Respondent suggests that the question presented is insubstantial because the majority opinion in the court below characterized the claim in this case as "push[ing] the margins of federal disability discrimination laws." (Br.Opp. 1; Pet. App. 22a). The dissenting opinion, on the other hand, insisted that the actions of the USOC were an obvious violation of section 504; "[w]hat the statute forbids is exactly what has occurred and is occurring here." (Pet. App. 15a). The rhetorical force of these conflicting opinions attests, not to the clarity of the issue, but only to its importance.

Respondent acknowledges that under *Alexander v. Choate* a recipient cannot define its benefit "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." 469 U.S. at 301 (Br.Opp. 26). The

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[6] See Title IX and Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71413 (1979); Clarification of Intercollegiate Athletics Policy guidance: The Three-Part Test (1996), http://www.ed/gov/about/offices/list/ocr/docs/clarific.html

USOC nonetheless insists that it is in compliance with the interpretation of section 504 set out in *Choate* because

> [t]here is but one criterion for gaining access to that benefit: the individual must be eligible to represent the United States at the Olympic Games.... [T]he ... eligibility criterion is "neutral on its face ...." ... *Choate*, 469 U.S. at 302.

(Br.Opp. 26). Respondent's quotation from *Choate*, however, omits the beginning of the sentence, in which the Court emphasized that the practice in that case also did not involve "criteria that have a particular exclusionary effect on the handicapped." 469 U.S. at 302. Such an exclusionary effect, also prohibited by the Department of Justice section 504 coordinating regulations,[7] is precisely the consequence of the criterion at issue in this case. *Choate* does not permit a recipient to utilize any criterion so long as it is "neutral on its face"; the criterion is also subject to challenge if it denies "meaningful access." The criterion at issue – eligibility to represent the United States in the Olympics – has not been satisfied by

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[7] The Department of Justice section 504 coordinating regulations provide that "[a] recipient may not ... utilize criteria ... [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap." 28 C.F.R. § 41.51(b)(3). All federal agencies are required to issue and enforce regulations "consistent with" this provision. 28 C.F.R. § 41.4(a).

any disabled athlete since 2000. (Br.Opp. 7-8). Near total exclusion cannot constitute meaningful access.[8]

Respondent agrees that section 504 would forbid a recipient from allocating benefits between its programs if it acted out of discriminatory *purpose*. The USOC maintains, however, that it did not act with any "discriminatory animus" toward disabled athletes, and has no "history of *de jure* segregation." (Br.Opp. 29, 30 n.5). The forms of discriminatory motive forbidden by section 504, however, are not limited to outright antipathy towards the disabled. In enacting section 504, Congress concluded that purposeful discrimination was "most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

Respondent recognizes that under section 504 it could not engage in practices that had the effect of favoring able-bodied over disabled athletes who were in "a single program." (Br.Opp. 23). The USOC describes its mission as "promot[ing] the *overall* standing of the United States in these international competitions" (Br.Opp. 3; emphasis added), referring

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[8] Respondent represents that since this case was considered in the district court there have been some changes in degree to which benefits are provided to Paralympic athletes. (Br.Opp. 5 n.3). Respondent makes no assertion as to the level of those benefits or the numbers of Paralympic athletes who have ever received them, and does not contend that any such changes are permanent or have rendered this case moot.

to the Olympic Games, the Paralympic Games, and the Pan American Games. *Id.* Respondent insists, however, that for the purposes of section 504 its support of athletes in the Olympics, of athletes in the Paralympics and of athletes in the Pan American games are all "different programs." (Br.Opp. i, 2, 14). Traditional basketball and Paralympic basketball, respondent argues, are "different program[s] designed for different athletes competing ... at different competitions." (Br.Opp. 14). But precisely the same thing could be said about a university's men's and women's basketball teams. Respondent does not explain why such differences are legally irrelevant under Title IX, but yet somehow dispositive of the instant claim under the identically worded language of section 504.

III. THE UNIQUE IMPORTANCE AND RESPONSIBILITIES OF THE UNITED STATES OLYMPIC COMMITTEE WARRANT REVIEW OF THE QUESTION PRESENTED

In *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999), the petitioner persuasively argued in support of certiorari that the question of whether the NCAA is subject to Title IX was "exceptionally important solely as it pertains to the NCAA, the organization charged with the 'critical

role' of regulating intercollegiate athletics."[9] The United States Olympic Committee plays an equally critical role in the participation of American athletes in international competitions; whether section 504 applies to the USOC in a meaningful manner is of similarly exceptional import. The United States Olympic Committee is a unique American institution, chartered by Congress for the very purpose of representing the interests of the nation in the international arena. The USOC's successes have been matters of national acclaim and its failures have properly been matters of concern to the federal government and to the American public.

The USOC's treatment of Paralympic athletes, which the district judge aptly characterized as "relegat[ing] Paralympians to second class status" (Pet. App. 47a), offends the very purpose of the Paralympics, and of the congressional decision to confer on the USOC responsibility for overseeing American participation in those games. The symbolism of that unequal treatment sends the worst possible message to Americans with disabilities, athletes as well as non-athletes. See *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). For Paralympic athletes, the denial of financial support from the USOC is particularly serious. Those athletes cannot expect to benefit from lucrative endorsement contracts, rarely have

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[9] Petition for Writ of Certiorari, No. 98-84, at 2.

collegiate sports programs to rely on, and cannot look forward to the possibility of making a living as coaches or professional athletes.

Counsel for respondent emphasizes that the USOC, in its commitment to equal opportunity, permits paraplegic athletes as well as the able-bodied to compete for the financial assistance available to those who excel at the 400 meter hurdles, the high jump, or the pole vault. (Br.Opp. 13, 19). Paralympic athletes might understandably regard that proffered opportunity as an empty gesture.

It is not the case that United States Paralympic athletes, despite the practices at issue in this case, have been more successful than our Olympic athletes. At the 2006 winter games the United States Olympic Team won 10% of the medals, and ranked second; the Paralympic Team won 7% of the medals, and ranked seventh. At the 2004 summer games the United States Olympic Team won 11% of the medals and ranked first; the Paralympic Team won 6% of the medals and ranked fourth. The data relied on by respondent, estimating the proportion of athletes who won medals, is misleading, because the number of Paralympic competitors is far smaller than the number of Olympic competitors.[10]

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[10] For example, at the 2006 Winter Olympics 2508 athletes competed for 252 medals. At the 2006 Paralympics, which awarded 174 medals, there were only 477 athletes. Detailed

(Continued on following page)

Judicial understanding of the problem posed by this case will not be improved by further litigation against other defendants. There is, after all, but a single United States Olympic Committee. There is little likelihood that any subsequent section 504 lawsuits against the USOC itself would add anything, particularly since such claims would have to be brought in (or likely would be transferred to) the Tenth Circuit, where under the decision below those claims would promptly be dismissed without discovery or other substantive proceedings. This case is not merely a good vehicle for assessing the legality of the USOC's policies; it may, as a practical matter, be the only vehicle for doing so.

Respondent argues that judicial enforcement of section 504 against the USOC is unnecessary because the USOC regularly submits reports to both Houses of Congress detailing its efforts with regard to disabled individuals. (Br.Opp. 33). Certiorari assertedly is unwarranted because Congress already "carefully monitors and assesses the opportunities for disabled individuals in amateur athletics." *Id.* The USOC does not, however, contend that it ever disclosed to Congress in those reports any of the discriminatory practices at issue in the instant litigation.

In light of the unique national role and responsibilities of the United States Olympic Committee, and

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data regarding the Olympic and Paralympic Games is set out in an Appendix to the reply brief.

the compelling arguments against the legality of its practices, it is hardly surprising that six members of the Tenth Circuit Court of Appeals concluded that rehearing en banc was warranted. In the present posture of this litigation, the USOC has prevailed essentially by chance, because of the randomly chosen composition of the particular appellate panel whose decision remained in effect only because the circuit as a whole was evenly divided. A legal issue of such palpable national importance should not be resolved by sheer caprice.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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s and US Medals	URL for Number of Athletes
/games/past/table_ 1996	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=1&OLGY=1996
/games/past/table_ 1998	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=2&OLGY=1998
/games/past/table_ 2000	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=1&OLGY=2000
/games/past/table_ 2002	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=2&OLGY=2002
/games/past/table_ 2004	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=1&OLGY=2004
/games/past/table_ 2006	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=2&OLGY=2006
lease/Main_Sections_ mpics_reports.html? es=1996PG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Summer_Games_Overview.html
lease/Main_Sections_ mpics_reports.html? es=1998PWG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Winter_Games_Overview.html
lease/Main_Sections_ mpics_reports.html? es=2000PG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Summer_Games_Overview.html
lease/Main_Sections_ mpics_reports.html? es=2002PWG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Winter_Games_Overview.html
lease/Main_Sections_ mpics_reports.html? es=2004PG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Summer_Games_Overview.html
lease/Main_Sections_ mpics_reports.html? es=2006PWG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Winter_Games_Overview.html
an_American_Games	
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

SCOT HOLLONBECK, et al.,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF THE BLIND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS ADVOCATES, THE LEGAL CENTER FOR PEOPLE WITH DISABILITIES, DISABILITY RIGHTS LEGAL CENTER, AMERICAN ASSOCIATION OF ADAPTED SPORTS PROGRAMS, WOMEN'S SPORTS FOUNDATION, RAFAEL IBARRA, KARIN KORB, TOM PETRANOFF, AND PUBLIC JUSTICE CENTER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interests of the *Amici Curiae*	1
Summary of Argument	6
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985) 6

DeFrantz v. U.S. Olympic Cmte., 492 F. Supp. 1181 (D.D.C. 1980) 13

Maass v. Higgins, 312 U.S. 443 (1941) 14

San Francisco Arts & Athletics, Inc. v. U.S. Olympic Cmte., 483 U.S. 522 (1987) 14

STATUTES

36 U.S.C. § 220502 (2004) 12

36 U.S.C. § 220503 (2004) 7, 10, 12

36 U.S.C. § 220505 (2004) 12

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TABLE OF AUTHORITIES – Continued

Page

CAROLE A. OGLESBY & DOREEN L. GREENBERG, ENCYCLOPEDIA OF WOMEN AND SPORT IN AMERICA (1998) 13

Denise M. Anderson, et al., *Adolescent Girls' Involvement in Disability Sport: A Comparison of Social Support Mechanisms*, 40 J. LEISURE RES. 183 (2008) 13

International Olympic Committee, *Athens 2004 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=2004 8

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TABLE OF AUTHORITIES – Continued

Page

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International Paralympic Committee, *Medal Standings Salt Lake City 2002 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2002PG 9

International Paralympic Committee, *Medal Standings Sydney 2000 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2000PG 9

International Paralympic Committee, *Medal Standings Torino 2006 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2006PG 9

Josh Pate, *Extremity Games*, ABILITY MAGAZINE, Jan. 1, 2007 11

PHILIP A. KLINKNER, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999) 13

SELECT COMMITTEE ON PUBLIC ACCOUNTS, REPORT, 2006, H.C. 898, *available at* http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/898/89805.htm 10

TABLE OF AUTHORITIES – Continued

Page

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are disability, civil rights, and sports equity organizations, as well as former members of the United States Olympic and Paralympic Teams. *Amici* submit this brief because of their concern that the U.S. Court of Appeals for the Tenth Circuit's ruling blesses second-class treatment of Paralympic athletes and could have a broad-ranging and harmful impact on the rights of individuals with disabilities in federally funded programs generally. Under the Tenth Circuit's analysis, the participation of individuals with disabilities in those programs is essentially a matter of charity, and recipients of federal funding have no obligation to provide those individuals equal access. Because the Tenth Circuit's ruling rested on a profound misreading of the law – and the message sent by the United States Olympic Committee's separate-and-unequal policy has broad-ranging consequences – *amici* have an especially strong interest in participating in this case. *Amici* are:

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[1] *Amici Curiae* have obtained the written consent of Petitioners Scot Hollonbeck, et al., as well as the written consent of Respondent United States Olympic Committee to file this brief with the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* note that counsel for *Amici* wrote the entirety of this brief and that no person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

The **National Federation of the Blind (NFB)** is the leading national organization of blind persons, with affiliates in all 50 states, the District of Columbia and Puerto Rico. Most of its approximately 50,000 members are blind. NFB is recognized by the public, Congress, governmental agencies, and the courts as a collective and representative voice of blind Americans and their families. NFB promotes the general welfare of the blind by (1) assisting the blind to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs concerning blindness that are held by sighted and blind persons and that result in the denial of opportunity to blind persons in virtually every sphere of life.

The **Disability Rights Education and Defense Fund, Inc. (DREDF)**, based in Berkeley, California, is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

Disability Rights Advocates (DRA) is a nonprofit public interest law firm that specializes in class action civil rights litigation on behalf of persons with disabilities throughout the United States. Based in Berkeley, California, DRA strives to protect the civil and human rights of people with disabilities throughout the United States and worldwide. DRA works to

end discrimination in areas such as access to public accommodations and services, employment, transportation, education, housing and health care.

The **Center for Legal Advocacy, d.b.a. The Legal Center for People with Disabilities and Older People (The Legal Center)**, is a Colorado non-profit corporation established to protect and promote the legal and human rights of persons with disabilities. It serves as Colorado's federally-mandated Protection and Advocacy System to advocate on behalf of the rights of individuals with disabilities. *See* 29 U.S.C. § 794e *et seq.*; 42 U.S.C. § 10801 *et seq.*; *id.* § 15043. Toward that end, The Legal Center has provided assistance to more than 16,000 persons with disabilities over the past three decades.

The **Disability Rights Legal Center (DRLC)** is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), Individual with Disabilities Education Improvement Act (IDEA), and other federal and state laws.

The **American Association of Adapted Sports Programs (AAASP)** is a non-profit membership organization consisting of adapted athletic programs residing within public school systems. Its sports serve student-athletes in grades 1 to 12 who have a physical or visual impairment. These athletes are not eligible for Special Olympics since they are not intellectually challenged and more closely resemble adult athletes participating in the Paralympic Games. AAASP works in partnership with education agencies in the United States to establish programs, policies, procedures and regulations in interscholastic adapted sports for students with disabilities in order to enhance educational outcomes and promote healthy lifestyles. In Georgia, the organization's "model state", AAASP serves as the governing and sanctioning body for these programs having established a dual governance alliance with the Georgia High School Association in 2001. Increasingly, AAASP is called upon to consult with state high school associations across the United States seeking to implement programs compliant with Section 504 of the Rehabilitation Act by establishing reasonable accommodations for their students with disabilities who increasingly have sought to be a part of athletics at school, both through the addition of athletic programs designed specifically for their abilities and, where appropriate, inclusively with their non-disabled peers on traditional teams.

The **Women's Sports Foundation** is a non-profit educational organization dedicated to ensuring equal participation and leadership opportunities for

girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports.

Rafael Ibarra represented the United States at the Seoul Paralympics in 1988, where he won the gold medal in the 800-meter and bronze medals in both the 4 x 100-meter relay and the marathon. He is currently preparing to compete for a place on the United States handcycling team in the Beijing Paralympics in 2008.

Karin Korb represented the United States in wheelchair tennis at the Sydney Paralympics in 2000 and the Athens Paralympics in 2004.

Tom Petranoff represented the United States at the Los Angeles Olympics in 1984 where he competed in the javelin throw. He previously held two world records in that event. He has coached for the South African Paralympic Team and has associated with many able-bodied athletes and athletes with disabilities at the elite level of sports.

The **Public Justice Center (PJC)** is a nonprofit civil rights and poverty law organization founded in 1985, with a longstanding commitment to promoting equality for all persons. One of several

arenas in which the PJC has actively pursued equality is between individuals who are able-bodied and those with disabilities. The PJC's Appellate Advocacy Project has submitted or joined in briefs of *amicus curiae* in recent cases involving claims by individuals with disabilities faced with discrimination by public institutions. *See, e.g.*, *Biggs v. Bd. of Educ. of Cecil County*, Docket No. 02-1318 (4th Cir. 2002); *Amos v. Md. Dep't of Pub. Safety & Corr. Servs.*, 205 F.3d 687 (4th Cir. 2000); *Terry v. Grasmick*, 114 F.3d 1177 (4th Cir. 1997).

SUMMARY OF ARGUMENT

Amici agree with Petitioners' argument that this Court should grant *certiorari* to review the Tenth Circuit's manifestly erroneous interpretation of the Rehabilitation Act. That interpretation, which permitted the United States Olympic Committee (USOC) effectively to write itself out of the Rehabilitation Act's nondiscrimination requirements by defining the off-the-field support it provides to Olympic and Paralympic athletes as separate programs, directly conflicts with this Court's precedents. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (stating that "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled"). That holding encourages recipients of federal funding to create separate, second-class programs for people with disabilities, a result

that directly conflicts with the letter and spirit of the Rehabilitation Act.

Amici do not seek to repeat the arguments made by Petitioners; instead, we seek to emphasize two distinct points that highlight the need for this Court's review. First, the USOC's own justification for giving less generous support to Paralympic athletes – that Olympic athletes have a greater need for that support to stay competitive – simply does not hold water, and smacks of the paternalism and stereotyping that has long denied opportunities to people with disabilities. In fact, the United States Paralympic team, unlike the United States Olympic team, has fallen behind its competitor nations in recent years because of the USOC's inequitable allocation of support. Second, given the leadership position the USOC occupies, and the shadow its decisions cast over other amateur athletic organizations, this case is exceptionally important. This Court's review is essential to vindicate the application of the disability discrimination laws in an area of great public prominence.

ARGUMENT

1. In the Tenth Circuit, the USOC justified its refusal to provide equal support to Olympic and Paralympic athletes on the ground that "Congress's command to attract 'the most competitive amateur representation'" required the disparity. USOC C.A. Br. 6 (quoting 36 U.S.C. § 220503(4)). The USOC

argued, in particular, that U.S. Paralympic athletes have been far more successful than U.S. Olympic athletes in recent years, and that Olympic athletes therefore needed greater support to stay competitive. *Id.*

But in fact, the U.S. Olympic team has performed extremely strongly vis-à-vis its competitors in recent years, while the U.S. Paralympic team has lost ground. The United States has earned the highest medal count in each of the last three Summer Olympics, and it has placed second in the medal count in each of the last two Winter Olympics.[2] By contrast, although the United States led the medal count in both the 1996 Summer and 2002 Winter Paralympics, it fell to third place in the 2000 Summer Games and then regressed to fourth in the most recent Summer Paralympics (2004) and seventh in the most recent Winter Paralympics (2006).[3] There is every reason to

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[2] International Olympic Committee, *Salt Lake City 2002 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=2&OLGY=2002 (last visited June 19, 2008); International Olympic Committee, *Turin 2006 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=2&OLGY=2006 (last visited June 19, 2008); International Olympic Committee, *Atlanta 1996 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT-1&OLGY=1996; International Olympic Committee, *Sydney 2000 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=2000 (last visited June 19, 2008); International Olympic Committee, *Athens 2004 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=2004 (last visited June 19, 2008).

[3] *Compare* International Paralympic Committee, *Medal Standings Atlanta 1996 Paralympic Games*, http://www.paralympic.

(Continued on following page)

believe that the USOC's policy of treating Paralympic athletes as separate and unequal has played a role in that decline.

During this period of decline by the United States Paralympic Team, rival nations such as Canada, Australia, and Great Britain implemented more equitable support for Paralympians and began to surpass the United States in medal counts and gold medals earned. These nations, which have often expressly integrated their Olympic and Paralympic teams,[4] provide essentially equal support to Olympic

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org/results/reports/medal_standings2pdf.php?sport_id=all&games_id=1996PG (last visited June 19, 2008), *and* International Paralympic Committee, *Medal Standings Salt Lake City 2002 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2002PG (last visited June 19, 2008), *with* International Paralympic Committee, *Medal Standings Sydney 2000 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2000PG (last visited June 19, 2008), *and* International Paralympic Committee, *Medal Standings Athens 2004 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2004PG (last visited June 19, 2008), *and* International Paralympic Committee, *Medal Standings Torino 2006 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2006PG (last visited June 19, 2008).

[4] For example, the national governing body, British Swimming, coordinates and controls *all* of Great Britain's swimmers on one team, whether Olympian or Paralympian. British Swimming and the ASA, *World Class Programmes*, http://www.britishswimming.org/vsite/vcontent/page/custom/0,8510,5157-18

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and Paralympic athletes.[5] Contrary to the USOC's assertion below, its inequitable treatment of Paralympic athletes appears to have impeded achievement of the USOC's mission to "obtain for the United States . . . the most competent amateur representation possible in each event of the Olympic [and] the Paralympic Games. . . ." 36 U.S.C. § 220503(4) (2004).

But *amici* do not point out the apparently harmful competitive effects of the USOC's separate-and-unequal policy merely out of concern that the USOC is failing in its statutory mission and harming the standing of American amateur athletics. Rather, *amici* point this out because the USOC's excuse for

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1895-199113-42421-268578-custom-item,00.html (last visited June 20, 2008) (stating that British Swimming coordinates both Olympic and Paralympic athletes). In the United States, by contrast, there exist two separate teams in swimming sports, one for (the able-bodied) Olympians and another for (people with disabilities) Paralympians.

[5] *See, e.g.*, SPORT CANADA, ATHLETE ASSISTANCE PROGRAM POLICIES AND PROCEDURES 1-1, 5-1 through 5-2 (2005), *at* http://www.canadianheritage.gc.ca/progs/sc/pol/athlete05/aap_e.pdf (stating that grants made through the Canadian Athlete Assistance Program are awarded to Olympic and Paralympic athletes in equal amounts); SELECT COMMITTEE ON PUBLIC ACCOUNTS, REPORT, 2006, H.C. 898, *available at* http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/898/89805.htm (indicating that Great Britain has made a similar equitable investment into its Olympic and Paralympic athletes in near equal measure with its World Class Performance Programme); Australian Paralympic Committee, *APC Programs*, http://www.paralympic.com.au/AboutAPC/APCPrograms/tabid/328/Default.aspx (last visited June 21, 2008).

separate-and-unequal treatment – that athletes with disabilities do not really need support, because their events are not really competitive anyway, and that resources would be better directed to nondisabled athletes – smacks of "the excuses and the veneer of good intentions" that have long been employed to deny opportunities to people with disabilities. *Americans with Disabilities Act of 1988: Hearing Before the Senate Committee on Labor and Human Resources*, 100th Cong., 2d Sess. 15 (Sept. 27, 1988) (statement of Rep. Coelho). As here, the excuses typically do not hold up under scrutiny. The disability rights *Amici* are concerned that the Tenth Circuit's holding blesses precisely the sort of conduct that Congress enacted the disability discrimination laws to prohibit. And the athletic *Amici* are concerned that the USOC's discriminatory policy exacts a personal toll on athletes with disabilities who participate in sport partly to escape the notion that they are inferior to nondisabled individuals. Josh Pate, *Extremity Games*, ABILITY MAGAZINE, Jan. 1, 2007, at 26 (summarizing how several extreme athletes with disabilities have come to feel more confident and equal to nondisabled athletes through sports designed for people with disabilities). This Court's review is essential to make clear that the Rehabilitation Act serves to protect individuals with disabilities against the paternalistic stereotypes that have long denied them opportunity – not least in the important context of high-level amateur sport.

2. The USOC is *the* federally-chartered corporation charged with "*exclusive jurisdiction* . . . over all matters pertaining to United States participation in the . . . Paralympic Games . . . including representation of the United States in the games." 36 U.S.C. §§ 220502(a), 220503(3)(A) (2004) (emphasis added). With that authority, the USOC is granted the power to "organize, finance, and control the representation of the United States in the competitions and events of . . . the Paralympic Games . . . and obtain, directly or by delegation to the appropriate national governing body, amateur representation for those games." 36 U.S.C. § 220505(c)(3) (2004). Accordingly, the USOC is the only entity capable of creating policies affecting Paralympians in the United States, making it the only possible defendant in a suit brought by a plaintiff seeking to challenge those policies. Further, because the USOC is not divided into separate entities on a state or individual sport level, but rather is a singular corporate body, suits challenging the USOC's policies are unlikely to arise in jurisdictions across the country.

As *the* national organization charged with supervision of elite amateur sports in the United States, the USOC's policies and actions are granted great weight by the national governing bodies of particular sports and other organizations associated with the USOC. Moreover, the nation as a whole looks towards the USOC as the voice of amateur athletics and accepts its positions as a model to emulate. The actions of the USOC send – and are often intended to

send – a social message. *See DeFrantz v. U.S. Olympic Cmte.*, 492 F. Supp. 1181 (D.D.C. 1980) (discussing the USOC's decision to boycott the 1980 Moscow Games in protest over the Soviet Union's invasion and occupation of Afghanistan). Unfortunately, the USOC is sending a strong, negative message to Americans and the world by its discriminatory policies regarding Paralympians.

The Olympics and Paralympics are a source of national pride and of aspirational role models. There can be no doubt of the impact on the American psyche of the performance of Jesse Owens at the 1936 Olympics in Hitler's Germany[6] or Wilma Rudolph at the 1960 Olympics.[7] Those athletes helped to change cultural perceptions of groups that had been stigmatized and subjected to discrimination. When the USOC persists in its disparate treatment of Paralympians, it encourages and entrenches the second-class status of people with disabilities in American society, and it deprives young Americans with disabilities of important role models. *Cf.* Denise M. Anderson, et al., *Adolescent Girls' Involvement in Disability Sport: A Comparison of Social Support Mechanisms*, 40 J. LEISURE RES. 183 (2008) (finding that young girls with disabilities who had positive athlete role models who also have a disability were

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[6] PHILIP A. KLINKNER, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 139 (1999).

[7] CAROLE A. OGLESBY & DOREEN L. GREENBERG, ENCYCLOPEDIA OF WOMEN AND SPORT IN AMERICA 104 (1998).

more likely to become active in athletics and view themselves, and be viewed by their able-bodied peers, as "normal").

This case is exceptionally important given the leadership position the USOC occupies, and the shadow its decisions cast over other amateur athletic organizations and society at large. In the past, this Court has recognized the importance of the USOC by granting *certiorari* even *absent* a conflict in the circuits. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Cmte.*, 483 U.S. 522, 528 (1987); *see also Maass v. Higgins*, 312 U.S. 443, 445 (1941) (granting a writ of certiorari without a circuit conflict because of the importance of the issue presented). In light of the conflict the Tenth Circuit's decision created with decisions of the Eighth and Ninth Circuits, Pet. for Cert. 28-33, this Court's review is especially warranted.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of *certiorari* should be granted.

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